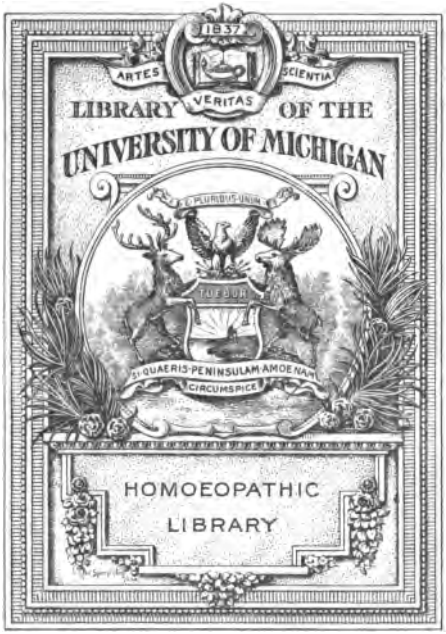
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HOSPITALS AND THE LAW

BY

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FOREWORD

THE motive of the writer of these pages has been to supply a short analysis of the general propositions of law relating to health institutions, and to make it readily comprehensible to those who are professionally or otherwise interested in such establishments.

The author acknowledges with appreciation the courtesy of Karl H. Van Norman, M.D., assistant superintendent of the Johns Hopkins Hospital, Baltimore; E. E. Southard, M.D., director of the Psychopathic Hospital, Boston, and George M. Kline, M.D., superintendent of the Danvers (Mass.) State Hospital, in sending copies of their record systems, which are models for hospitals of their type. On account of their comprehensive character it is impracticable to reproduce facsimiles in a book of this size.

Thanks are also due to John Sweet, M.D., of Hartford, Conn., for helpful suggestions.

E. V. M.

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HOSPITALS AND THE LAW

CHAPTER I

PRELIMINARY CONSIDERATIONS

Hospitals have existed for a very great space of time, quite possibly extending back much farther than our own era, but their tremendous increase has been all within comparatively recent years. While formerly a hospital performed a multifarious work, we have now in addition to the general hospital a vast number of special institutions which have for their object the exclusive care of certain classes of cases, such as those of a purely medical or surgical character, or those designed for the reception and care of the insane, for consumptives, for incurables, for the deaf-mute and blind, for inebriates and drug users, for the infirm and aged, and for a long list of other specialties. The result of this growth has been a corresponding expansion of the law relating to hospitals.

Somewhat over a century ago Lord Holt said, "An hospital is for those that are poor, and mean, and low, and sickly."[1] Heretofore the term was

[1] Phillips v. Bury, 2 Term Rep., 346, p. 353.

used to indicate a permanent retreat for the protection and relief of any class of afflicted and unfortunate persons, such as lunatics, as well as an institution which had for its object the admission and care of sick or injured persons. Usage, however, has placed a restriction upon the connection in which *hospital* may be used, limiting it to institutions that care for the sick, wounded, or infirm, and preferring *asylum* as indicating those places designed for the refuge of lunatics and other unfortunates.

Yet the word *asylum* has more than one signification. This was brought out in a case in which it became necessary to determine the status of an institution for the blind with respect to a certain constitutional provision. The court said, "It is, however, contended that the institute is an asylum; but what is an asylum? It is defined to be a place where persons flee for protection. Under the Mosaic Dispensation cities of refuge were set apart to which the slayer might flee so that innocent blood should not be shed, in case the person was not worthy of death—that is, in case the act was accidental and not malicious.[2] But among the ancients, outside of the Jews, it seems that temples, statues to the gods, and altars particularly consecrated for such purposes, constituted such places

[2] For particular description of the process, see Numbers xxxv. 6-33; Joshua xx.; Deut. xix.

of refuge for persons generally, and it was deemed an act of impiety to remove forcibly one who had fled to such an asylum for protection. However, Tiberius abolished all asylums except the temples of Juno and Æsculapius. These asylums finally passed over the Christian world, and under Constantine the Great all Christian churches were made asylums for those who were pursued by officers of justice or by the violence of their enemies, and the younger Theodosius, in the year 431, extended the privileges to all courts, gardens, walks, and houses belonging to the church. In the year 631 the Synod of Toledo extended the limits of asylums thirty paces from every church, and this privilege afterward prevailed in Catholic countries; it is said to have been a strong armor of defense against the wild spirit of the Middle Ages, and not without consequence at the time when force often prevailed against justice. But in later periods of time, as other and better systems of procedure in the administration of justice became adopted, asylums were abolished in most countries.[3]

[3] As a matter of detail, it may be remarked that an amusing modern form of the idea has manifested itself in Persia, where the introduction of the telegraph has enabled the suppliant to appeal to the Shah for sanctuary or asylum from great distance. Every one has a right to approach the Shah by telegram if he prepays a reply. The man who apprehends violence goes to the telegraph office, dispatches his appeal, and sits down

"Such then seems to have been the origin, nature and object of asylums, and such the common acceptation of the term; but more recently, in some countries, the name has been given to institutions for the protection and care of the poor, blind, deaf and dumb, and lunatics who are incapable of taking care of themselves."[4]

The history of hospitals antedates the Christian era, but there is a diversity of opinion as to the approximate location in respect to time of the vanishing point. While it is hardly more than a matter of historical curiosity so far as it affects the busi-

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to await the answer. As things in Persia move with a great deal of deliberation, this is probably several days in arriving. But as the telegraph office is the Shah's property, it is sanctuary, and the suppliant so long as he remains there is safe. It is no uncommon thing, therefore, to see a little group of suppliants, fortified with food and drink by their relatives, crouching in the telegraph office, while a corresponding group of avengers waits eagerly outside.—Jenks' *A Short History of Politics*, p. 115.

The right of *asylum* is recognized by international law. A neutral is permitted to receive troops and ships of the belligerents within his territory. Land forces must be interned, but in the case of vessels a reasonable time may be allowed for repairs, and the neutral may properly supply pacific stores and sufficient coal to last the belligerent to her nearest home port. The great European war has furnished specific instances of this, as where certain English forces were interned in Holland, and where permission to make repairs and take on coal was given to certain German vessels which sought asylum in United States ports.

[4] Grant, J., in State ex rel. Davis v. Bacon, 6 Neb. 286, pp. 290-291.

ness in hand, notice may well be taken of certain facts in this connection. Sir Henry Burdett sees the germ of the hospital system in the custom in Egypt and Greece of laying the sick in the precincts of the temples.[5] The intimate relation in earlier times of religion and medicine is seen in the fact that afflicted persons sought relief at certain temples, notably at those of Æsculapius; and for many centuries in Christian times medical knowledge was confined largely to the functionaries of the church. A survival of this is to be observed in the law that a physician in England prior to 1858 was supposed to work for an honorary reward and could not sue to recover his fee, the reason for this being that in former times a great many monks acted as physicians and they were incapable of possessing any property or bringing an action in court.[6] The very names given to hospitals frequently suggest the motive that prompted their foundation. The Hospitalers were the knights of a religious order, so-called because they built a hospital at Jerusalem A.D. 1042 where pilgrims were received.[7] In England all their lands and goods were given to the sovereign by the statute of 32 Henry VIII, Chapter 24. King Henry

[5] Cf. Sir Henry Burdett's article "Hospital," *Encyclopædia Britannica* (11th ed.).

[6] For discussion and citation of authorities, see *The Doctor In Court*, p. 79 et seq. (Rebman Company, New York.)

[7] Rapalje and Lawrence Law Dict.

abolished the hospitals connected with the monasteries.[8] A law of the Emperor Justinian having reference to certain institutions related to the church makes mention of the *Nosocomia,* which corresponds to our idea of hospitals.[9]

As to etymology, *hospital* is derived directly from the Latin *hospitalis,* relating to a guest, *hospitalia,* apartments for guests. Spenser used the word to denote an inn, or place of shelter and entertainment, but it is now obsolete in this connection, though the same root is present in our modern word *hotel.*

The meaning to be attached hereinafter to the term *hospital* will be one of wide latitude, its employment comprehending every kind of health institution, whether public or private, and without regard to the manner of its foundation or the means of its support; for there is no vital difference between the laws applicable to the institutions technically coming under the term *hospital* or the term *asylum.* As was said in an English case,[10] a hospital is "a place appropriated to the reception of persons sick or infirm in body or in mind." In a recent American case the same words were quoted with approval, and it was held that *asylum* was in-

[8] Cf. Montesquieu's *Spirit of Laws,* Book xxiii, ch. 29—"Of Hospitals."

[9] Sir Henry Burdett's "Hospital," *ante.*

[10] Needham v. Bowers, 21 Q. B. D. (Eng.), 436.

tended to denote and does denote an institution in the nature of a *hospital*.[11]

Now an account of the law of hospitals must naturally include a brief discussion of corporations. This is quite necessary because a great many hospitals are incorporated, though it must be borne in mind that it is not essential that they should be created as or transformed into such legal personalities. It is simply a convenient way of carrying out the purposes of the organizers or founders, especially where the object sought to be accomplished is wholly or in part charitable.

A corporation is a curious contrivance, but we need not for our purpose here trouble ourselves with any of the elaborate definitions. Yet it is important in reading the following pages to keep in

[11] French v. Association for Works of Mercy, 39 App. Cas. (D. C.), 406. Cf. Dilworth v. Stamp Com'rs. (1899), A. C. (Eng.), 99. Where a city ordinance provided for the establishment of hospitals, held *hospitals* included pest-houses.—Clayton v. City of Henderson, 103 Ky. 228, 44 S. W. 667; see also *Words and Phrases Judicially Used.* For definitions of *hospital* and *asylum* as used in the English Lunacy Acts, see 53 and 54 Victoria, c. 5, s. 341. "The state prison is not a 'hospital' or other 'charitable institution,' within the meaning of the act of March 26, 1895"—New Hampshire Asylum for Insane vs. Belknap County, 69 N. H. 174, 44 Atl. 928. As to the meaning of the word *institution*, see State v. Edmondson (Ohio), 106 N. E. 41. If an incorporated private hospital be conducted in a business way for profit and not on charitable lines, it is a *trading* or *mercantile corporation* within the meaning of the U. S. Bankruptcy Act. In re San Gabriel Sanatarium Co., 95 Fed. 271.

mind the idea of corporateness, and consequently a brief indication of some of the distinctive features of a corporation may prevent a misunderstanding and will serve our needs. Its chief object is to give to the members the power of acting as a single person. In other words, the law stamps a group of persons with the character of an individual. It creates a distinct legal entity apart from the persons of its members and endows this artificial person with certain individualistic rights, such as the right of making contracts, of acquiring property, and of suing and being sued. But in respect to its powers and capacities it is somewhat different from the individual, and the principal point of dissimilarity lies here. We know that the life of a man is limited; we know approximately the length of the average person's life. This is not the case with corporations. Their existence is not limited by nature; they are said to be immortal. This fact that the artificial person or metaphysical entity is thus capable of existing in perpetuity manifestly makes it an important agency for the administration of property left in trust for charitable purposes. The result is that hospitals are usually incorporated, although aside from this feature the rights and privileges conferred upon the juristic person make it the approved form of association.

We are not concerned with the legal research

respecting the origin of corporations, but we may digress for a moment to note as of possible interest that while the first corporations in England were ecclesiastical and municipal,[12] charters were also granted by the crown at an early time for the creation of charitable corporations, like hospitals, as is evidenced by the decision in Sutton's Hospital Case,[13] decided in the ninth year of the reign of James I.[14]

In the next place it is to be observed that corporations are either public or private. There is a marked difference between the two classes, which it becomes important to consider here, as hospitals may be either public or private. The distinction seems easily made, but it is not so obvious as one is led to believe.

A public corporation is created for carrying on the business of government. A private corporation is created primarily for the private benefit and purposes of its members. The nature of the work or the purpose for which a corporation is organized is not the test; nor does the fact that the state may create a similar corporation for the accomplishment of its own purposes form a touchstone of the public or private character of the institution; and the

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[12] Cf. Marshall on Corporations, s. 2.

[13] 10 Coke 1.

[14] By the statute of 39 Elizabeth, ch. 5, cities were given the power to establish hospitals.

sources of its revenue for support may not be arbitrarily set up as a standard. In other words, the fact that a hospital is free to the public does not make it a public corporation; nor does the fact that the state in discharging its duty of conserving the public health may and frequently does establish hospitals of its own, which are public corporations because administering a function of government—such fact does not serve as a test of identification; and a hospital may be a private corporation though partially endowed by the state.[15]

This matter was set forth in the case of the Regents of the University of Maryland v. Williams,[16] decided in 1838. It became material in that case to determine whether or not an act authorizing "The College of Medicine of Maryland" to establish the other departments—law, divinity, arts and sciences—under the title of the "University of Maryland," created a public or a private corporation. Without going into the facts of the case let us quote an excerpt or two from the opinion by way of explanation of the matter under consideration.

The court speaking through Chief Justice Buchanan said, "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the

[15] Chalfant v. State. 37 Ohio St. 60.
[16] 9 G. and J. (Md.), 365.

public good in the administration of civil government; an instrument of the government, subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as the cases of cities, towns, etc.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by the government for general charity."

Although State universities are generally public corporations, in this particular case the court, after holding that the corporation had none of the characteristics of a public corporation, proceeded as follows: "But it has been urged in argument at the bar, that whenever the end is public, the franchise granted to effect that end is also public. That here the end was the preservation of life and health, which depended upon the skill of those who minister to the sick, etc., a public end in which the whole public have an interest, and therefore that this corporation is public. . . . .

"It is not enough to say that the public has an interest in the skill and learning of physicians and surgeons. The public has a deep interest in the dissemination of learning and useful knowledge, and so it has in the beneficial results to the community of insurance, canal, railroad, and turnpike companies, etc. The uses or objects may, in a

certain sense, be called public; but the corporations as distinguished from the uses or objects are private."

And the Supreme Court of the United States, after speaking in substantially the same words, adds, "This reasoning applies in its full force to eleemosynary [17] corporations. An hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity." [18]

To quote further, but this time from a legal commentator, "A charity may be public, though administered by a private corporation. . . . . The charity of almost every hospital is public, while the corporations are private. To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of the terms, and to jar with the whole current of decisions from the time of Lord Coke." [19]

At this point the true test emerges. It is the relation between the corporation and the state. "To create a public corporation it must appear that the intent of the legislature in granting the incorporation is to create an official agency of government. Such organizations as cities, towns,

[17] Charitable. See *post*, pp. 13-14.
[18] Dartmouth College Trustees v. Woodward, 4 Wheaton 668.
[19] 2 Kent's Comm. 276.

villages, counties and townships are typical public corporations; others are State universities, incorporated boards of commissioners, trustees of a county asylum, or of a municipal hospital or library.''[20]

While the distinction is not of very great importance, it should nevertheless be remembered that in legal theory hospitals are spoken of as being public or private, not according to the character of the work they do, but with reference to whether they are public or private corporations.

A further point of importance to be noticed in corporation law having application to hospitals is the division into eleemosynary and civil corporations. The former—sometimes called charitable corporations[21]—are not created for profit, but for the purpose of administering charitable trusts; while the latter—save for ecclesiastical corporations—include all other corporations whether public or private. As stated by the Supreme Court of Errors of Connecticut:[22] ''Eleemosynary corporations, or those created for charitable purposes, are such as are constituted for the perpetual dis-

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[20] Elliott on Municipal Corporations (2nd edition), p. 4.

[21] Both Bouvier and Black in their law dictionaries, after defining hospital, say such institutions are generally incorporated, and then of the class of corporations called eleemosynary or *charitable*. Cf. Blackstone Comm. 471.

[22] American Asylum v. Phœnix Bank, 4 Conn. 172, 10 Am. Dec. 112.

tribution of the free alms of the founders of them, to such purposes as they have directed. Of this description are hospitals for the maintenance of the poor, sick, or impotent. . . . . The true test of an institution is its origin and objects. If it is founded on donations, and has for its purpose the accomplishment of a charity, by the distribution of alms, it most unquestionably is eleemosynary." Thus it is apparent that a hospital may be eleemosynary or civil depending upon its endowment, purpose, etc. The paramount importance of determining in many cases in which category a hospital is to be placed is because the powers, obligations, and responsibilities of the two classes are not alike. This will appear hereinafter from a discussion of the cases.

The reason the state creates such public corporations as hospitals is because one of its administrative duties is the protection of the public health. This and other duties of government touching the welfare and comfort of the people are vested in the state police power. In speaking of the police power we do not refer to the authority of the blue-uniformed policeman directing the traffic, but rather to that particular and inherent power of the state that has for its object the protection of the life and health of its people and the safeguarding of their property. It is founded upon the two legal maxims, "regard for the public welfare is

the highest law," and "you shall so conduct yourself and so enjoy your own as not to injure others." Comprehending within its exercise the health and morals of the community, extending to many different subjects, and covering a wide social field, we find this power existing in all nations and States.

Such is in general the nature of the police power, but the term with its limitations is not susceptible to even an approximate definition. "But we may say generally that as the nervous system extends to all parts of the body, yet in some portions is easily perceived and easily described, while in others it must be sought for with a microscope, so in the body politic, this police power is everywhere found from centre to periphery, sometimes defined by large and conspicuous lines, sometimes delicate and half hidden, but always ready to be awakened into activity by the irritation of danger or discomfort." [23]

The good health of its people is of tremendous importance to the state and is one of the chief objects of government, not only because of the expense that may be imposed by the duty of caring for the indigent and infirm in body and mind, but also because the state is the public in its corporate capacity, and a corporate body like that of a human being must be healthy in order to attain that degree

[23] Howe's *Studies in the Civil Law* (2nd edition), p. 173.

of potency essential to its own progression. It petitions a power that must of necessity be extensively employed; a power of vital concern to the public well-being.

A State carries out its duties under the police power by at least two agencies. It may do this work through incorporated boards, commissions, and public officers, with capacity to act for the whole State or for a particular locality, as a county or town; or it may clothe its towns, cities, and counties with power to act in State matters and carry out its police powers in matters of health, etc. This highly important matter of health protection is usually entrusted to boards of health created to act for the entire State or for a particular locality. The powers of these boards are almost imperialistic, their right to act during epidemics being somewhat analogous to that of the military during times of riot. They have a wide discretion in the choice of measures to prevent the spread of infectious or contagious diseases, even going so far as to destroy property contaminated with the germs thereof.[24] They may establish and maintain hospitals and pesthouses, employ physicians and nurses, maintain quarantine, and remove and isolate infected persons by temporary imprisonment.

As has been intimated the police power is found

[24] Mugler v. Kansas, 123 U. S. 623; Deems v. Baltimore, 80 Md. 164, 26 L. R. A. 541.

in the national, State, and local governments for use within the proper sphere of their respective actions. In the establishment of a State insane hospital we have a good illustrative example of the direct exercise of this power, and in the establishment of hospitals by municipalities we witness the carrying out of the same power through its delegation to one of the agencies of the State. Under the police power the public health laws of the United States are to a great extent intrusted to State and local authorities. The reason for this is apparent immediately we think of the nature of our government with its line of demarcation between the powers expressly given to the national government and those reserved to the individual States. Like many other matters local health administration is deemed to be in the hands of the several States, the police power never having been surrendered to the Federal government either expressly or impliedly. It follows that the jurisdiction of the central government is somewhat restricted as to the health matters over which it has authority, yet the work of the national public service is highly important and covers a considerable domain, for the Federal government has control of foreign and interstate commerce.

The national board of health is the Public Health Service, which in addition to its regular functions acts in many instances as a common agency of the

States in health work. The local boards of health were the first organized authorities to exercise health powers. In 1797 Massachusetts took the lead by passing legislation constituting town boards of health and in the majority of States these local boards were the forerunners of the State health bodies. The inclination now seems to be toward greater centralization and an increase in the powers of the more general boards; but the separation of State and national governments circumscribes the various public health agencies in this country, and while there are many marine hospitals under the supervision of the national health service, their ratio to the totality of State hospitals is small.

In England there is more centralization of authority in these matters, and the vast and complicated machinery of the public health department is under control of the Local Government Board. The so-called Public Health Acts consist of much detailed legislation of a wide scope.[25] The duties imposed by these acts are discharged by the urban and rural district councils, subject to general supervision by the Local Government Board. For the purpose of sanitary administration all England and Wales are divided into health districts, their size depending upon the populousness of the locality.

[25] For citation of the Public Health Acts and particular treatment thereof, see the Earl of Halsbury's *Laws of England*, vol. 23, p. 361 et seq.

Mention is made of these things because we shall take up later the establishment of hospitals under the Public Health Acts.

From the foregoing general and preparatory considerations we come in the following chapters to the analysis of the various phases of the law affecting health institutions. These introductory statements have been made as a guide to the purport of the cases we are about to consider, and to make the propositions deduced from the decisions of judges more readily comprehensible.

CHAPTER II

RIGHTS AND RESPONSIBILITIES

In entering upon a discussion of the rights and responsibilities of hospitals we are met at the threshold by certain things which should properly have our consideration, though we shall need to pause only momentarily and can brush quickly by them. No intimate acquaintance with legal principles is necessary for one to know that where a person improperly disregards the safety of another's person or property, he is legally negligent; and if one actually undertakes to perform some service for another, it is his duty to use reasonable care in the execution thereof, as negligence in the discharge of such duty may subject him to legal liability.

Ordinarily one is not held answerable for a mere omission. As Sir Frederick Pollock says, "Not that the consequences or the moral gravity of an omission are necessarily less. One who refrains from stirring to help another may be, according to the circumstances, a man of common, though no more than common good will and courage, a fool, a churl, a coward, or little better than a murderer. But unless he is under some specific duty of action,

his omission will not in any case be either an offense or a civil wrong. Some already existing relation of duty must be established, which relation will be found in most cases, though not in all, to depend on foregoing voluntary act of the party held liable. He was not in the first instance bound to do anything at all, but by some independent motion of his own he has given hostages, so to speak, to the law."[1]

For the purpose of bringing this matter into clearer relief perhaps the setting out of an illustration will be of help. A physician or surgeon is under no legal obligation to render assistance to a person, notwithstanding the popular notion to the contrary, and his omission to do so does not make him responsible. But let him once take upon himself the care of a case, then the law says that he contracts by implication to employ, in the aid and relief of his patient, that degree of learning and skill possessed by other members of the profession similarly located, and if he is unskillful or negligent, if he carelessly omits or commits an act that such other physicians would not be guilty of in the exercise of proper care, he can be made to respond in damages to the injured person. To quote again from Sir Frederick Pollock,[2] "I am not compelled

[1] Pol. Torts, p. 389, cited in Powers v. Homœopathic Hospital, 109 Fed. 294, 65 L. R. A. 372, 47 C. C. A. 122.

[2] See *supra*.

to be a parent; but, if I am, I must maintain my children."

Closely akin to this is the so-called doctrine of *respondeat superior,* which means that the master or principal is liable for the wrongs of his servant or agent done within the scope of his employment.[3] The doctrine is applied to hospitals by the Federal court [4] in this language: "If one contracts to treat a patient in a hospital—or out of it, for that matter—for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out his contract. If one undertakes to treat such patient for the purpose of making profit thereby, the law implies a contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes." Or, adopting another utterance of Sir Frederick Pollock,[5] "I am not compelled to employ servants; but, if I do, I must answer for their conduct in the course of their employment." In other words, a hospital must be carried on with reasonable skill and care, and patients therein are entitled to competent medical advice and assistance. For dereliction in the dis-

[3] Black's Law Dict.

[4] Sanborn, J., in Union Pacific Ry. Co. v. Artist, 60 Fed. 365.

[5] See *supra.*

charge of this duty the hospital is responsible in damages for resulting injury. A patient is generally admitted to a hospital conducted for private gain under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition may require.[6] A hospital is not an insurer nor is it held to the highest standard of care and diligence, but is only required to use what is ordinary and reasonable.[7]

There is in the law of hospitals one highly important exception to the rule that such institutions may be liable for the negligence of their officials. It is in those cases where it is sought to hold a charitable corporation answerable. In the first chapter mention was made of the classification of hospitals into those that are charitable and those that are conducted for the private profit of its promoters. It was then noted that their rights and liabilities were different. Herein lies the chief distinction. The purely charitable institution enjoys an exceptional immunity under the well established doctrine of the law that public and private charities are not liable in damages to patients or inmates for the negligent acts of their

[6] Wetzel v. Omaha Maternity and General Hospital Ass'n., 96 Neb. 636, 148 N. W. 582; Broz v. Omaha Maternity and General Hospital Ass'n., 96 Neb. 648, 148 N. W. 575.

[7] Hogan v. Clarksburg Hospital Co. (W. Va.), 59 S. E. 943.

servants, provided due care was used in selecting those servants.[8]

The importance of this salutary rule comes to us when we consider for a moment the large number of hospitals maintained as charitable institutions. As was quite aptly said by Judge Cardoza, of the New York court,[9] "A hospital opens its doors without discrimination to all who seek its aid. It gathers in its wards a company of skilled physicians and trained nurses, and places their services at the call of the afflicted, without scrutiny of the character or worth of those who appeal to it, looking at nothing and caring for nothing beyond the fact of the affliction. In this beneficent work, it does not subject itself to liability for damages, though the ministers of healing whom it has selected have proved unfaithful to their trust."

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[8] Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92; Hearns v. Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; Powers v. Massachusetts Homœopathic Hospital, 109 Fed. 294; Downes v. Harper Hospital, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602; Thornton v. Franklin Square House, 200 Mass. 465, 22 L. R. A. (N. S.) 486; Joel v. Woman's Hospital, 89 Hun (N. Y.) 73, 35 N. Y. Supp. 37; Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; Parks v. Northwestern University, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103; Ward v. St. Vincent's Hospital, 23 Misc. (N. Y.) 91, 50 N. Y. Supp. 466; Duncan v. Nebraska Sanitarium and Benevolent Ass'n., 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N. S.) 973; Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855, 118 Am. St. Rep. 448, 7 L. R. A. (N. S.) 481, 8 Ann. Cas. 1109.

[9] Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92.

In the United States there is apparently only one decision holding the opposite view. This is a Rhode Island case,[10] but the rule announced by the court was got rid of by the legislature of that State passing a statute nullifying it.[11] The decision, however, was not without its effect, as it was approved in a subsequent Canadian case,[10] although the rule in England [13] is the one upon which the general United States doctrine is predicated.[14]

In gaining and establishing themselves in the position taken upon this question of the nonliability of philanthropic and benevolent institutions, the courts have travelled no royal road. They have approached it from many points of the legal compass and over totally different ground. The objective obtained has been the same, but considerable dissension has been fomented as to the best route to be taken. It would profit us little to enter into an extended discussion of the various grounds upon which the decisions have been based, inasmuch as the principle itself is well established.

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[10] Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

[11] Cf. 4 Annotated Cases 104, note; 21 Cyc. 1105.

[13] Donaldson v. Commissioners, 30 New Brun. 279, 299 (action for damages for malpractice in permitting the loss of a patient's eye through disease). Cf. Lindler v. Columbia Hospital, 81 S. E. (S. Car.) 512.

[13] Heriot's Hospital v. Ross, 12 Clark and F. (Eng.), 507.

[14] Cf. McDonald v. Massachusetts General Hospital, 120 Mass. 432, and cases cited in note 8, ante.

Nevertheless we may indulge in a brief consideration of them, and that we have now come to do.

In some cases the exemption of these eleemosynary institutions is founded upon the fact that such places are supported by funds furnished by public and private charity; that such funds being held in trust for specific purposes cannot be diverted to extraneous uses, and that to pay damages for the wrongs of their employés would constitute an unlawful diversion of the trust funds. Other cases say that public policy demands the encouragement of the maintenance and support of charities, and some hold that one accepting the benefits thereof does so with the understanding that he thereby exempts his benefactor from responsibility for the negligence of the latter's servants. The most popular of these, however, is the first.

If this rule of immunity was not in force, say the plurality of the courts, it would not be difficult to discern that private gift and public aid would not be long contributed to feed the hungry maw of litigation, and charitable institutions would cease or become greatly impaired in their usefulness.[15] To hold otherwise would be to sanction a rule that would compel those who have furnished such accommodations and services to pay for the negli-

[15] Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141.

gence or mistakes of physicians and attendants they have selected with reasonable care, and the inevitable result of such rule would be to repress the charitable instincts of men.[16]

In the leading English case of Heriot's Hospital v. Ross,[17] a jeweller in the year 1623 left a considerable portion of his estate to certain officers of the city of Edinburgh in perpetuity for the purpose, according to the will, of founding and maintaining a hospital for the "maintenance, relief, bringing up, and education of so many poor fatherless boys, freemen's sons of that town, as the means which I give, and the yearly value of the lands so purchased shall amount and come to." A doctor named in the will was to formulate the rules by which the hospital was to be governed, and this the doctor did, admitting boys between certain ages to the hospital. Upwards of two centuries after the establishment of the institution a suit for damages was brought against the hospital by a boy who alleged that he was wrongfully excluded therefrom. It was held he could not recover. Said Lord Cottenham: "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different view."

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[16] Union Pac. Ry. Co. v. Artist, 60 Fed. 365.
[17] 12 Clark and F. 507.

To pass on to another case, this time decided by the United States Circuit Court of Appeals,[18] we find, in a suit against a hospital for injuries occasioned by the negligence of a nurse in placing a hot water bottle against a patient's side resulting in an injury, that the court expresses itself as follows: "One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. . . . It would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of the Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of these thousand men. We cannot perceive the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving

[18] Powers v. Massachusetts Homœopathic Hospital, 109 Fed. 294, 65 L. R. A. 372, 47 C. C. A. 122.

less of personal service than did he, but by combining their liberality, thus enabled to deal with suffering on a large scale."

Whatever the ground upon which the exemption is placed it is quite certain that every member of the public is deeply interested in the maintenance of charitable institutions designed for the alleviation of human suffering, and the state itself is concerned that its citizens may be restored to health. The Missouri court [19] after noting these things suggests as a general reason for the courts adopting the rule that, "In the thoughts and consciences of men, charities are not loaded with burdens put upon other matters. Charity suggests different considerations and treatment from matters of ordinary business, and hence there has arisen out of the conscience, a principle which protects it in its beneficent and perpetual purpose. The greatest authority has said that, though prophecies shall come to naught, and tongues shall cease, and knowledge shall vanish away, yet 'charity never faileth.' That and other statements of like tenor, though perhaps referring to mental conditions, have doubtless done much to foster privileges which have been accorded to material benevolence."

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[19] Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453.

The natural result of this doctrine of exemption has been to make the courts consider many questions relating to its applicability, as it has been frequently invoked as a defence under varying circumstances. Perhaps the best clue to the solution of the various issues so raised is furnished by an examination of the cases themselves, and accordingly they shall now have our attention.

We have seen hitherto that the test of a charitable corporation is the object or purpose for which it was created, or, in the language of the Massachusetts Supreme Court,[20] "The dominant purpose for the promotion of which the institution was organized and has been maintained furnishes the test, whether it is a charity, or a business organization conducted for commercial gain, with incidental acts of charity." The Maine court says, "It comes within the letter and spirit of a charitable corporation whose distinctive feature is that it has no capital and no provision for making

[20] New England Sanitarium v. Inhabitants of Stoneham, 91 N. E. (Mass.) 385. In Jackson v. Phillips (14 Allen, [Mass.] 539, 556), Mr. Justice Gray said: "A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of the institution."[21]

In speaking of a certain hospital the Massachusetts Supreme Court through Judge Devens said, "The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust, to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a great public purpose—that of administering to the comfort of the sick, without any expectation on the part of those immediately interested in the corporation of receiving any compensation which will inure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity."[22]

In Powers v. Massachusetts Homœopathic Hospital,[23] the plaintiff sued the defendant, a public hospital chartered as a charitable corporation, for damages suffered because of the negligence of a nurse while the plaintiff was a patient

[21] Webber Hospital Association v. McKenzie, 104 Me. 320.
[22] McDonald v. Massachusetts General Hospital, 120 Mass. 432.
[23] 109 Fed. 294, 65 L. R. A. 372.

in the defendant hospital. It appeared that the plaintiff was what is called a paying patient, and upon this ground her counsel sought to distinguish her case from that of a patient in the hospital who paid nothing. The court disposed of this contention in these words: "In our opinion, the difference is immaterial. As has been said, the defendant was a charitable corporation; that is a corporation organized exclusively for charity. That the ministrations of such a hospital should be confined exclusively to the indigent is not usual or desirable. Those of modest means from necessity, and not a few rich people from choice, resort to great charitable hospitals for treatment, especially in surgical cases. Throughout the world this is the custom in these hospitals, whether they are maintained by individual, religious, or municipal charity. From patients who are not indigent payment is commonly permitted or required. Commonly, and in the case at bar quite manifestly, this payment does not make full pecuniary compensation for the services rendered. Those who make a considerable payment not infrequently receive in some respects a more expensive service than do those who make a small payment or none at all; but the payment required is usually calculated upon the patient's ability to pay, rather than upon the whole cost of the treatment he receives. That this was the defendant's rule appears plainly from its printed ap-

plication, which it required all applicants to fill out alike, whether they paid something or nothing. In this form the inquiry concerning payment was stated as follows: 'How much per week applicant can pay,'—thus indicating that the amount of the contribution was to be determined, not by the value or cost of the service rendered, but by the ability of the patient to aid the charitable purposes of the hospital. In our opinion, a paying patient in the defendant hospital, as well as a non-paying patient, seeks and receives the services of a public charity. . . . . That such hospital in its treatment of a rich patient shall be held to a greater degree of care than in its treatment of a pauper is not to be tolerated. Certain luxuries may be given the former which the latter does not get, and this for various reasons; but the degree of protection from unskilled and careless nurses must be the same in both cases."

So also where suit was brought against a hospital conducted for charitable purposes alone for damages for the death of an insane patient who committed suicide while alone in a room, it appeared that pay for the patient's room and care was received under an agreement to keep a nurse in constant attendance, but it was held that the hospital incurred no liability for the negligence of the nurse in leaving the patient even though it accepted compensation for the room, board, and care

of such patient; because money accepted from patients who were able to pay it did not go to persons who were trustees, directors, founders, or incorporators of the institution, and was not a source of pecuniary gain to private individuals, but was devoted to the general purposes of the charity.[24]

In another case[25] a patient brought action against a hospital for a permanent injury alleged to have been sustained as a result of the unskillful surgical treatment of his leg by a medical student. The defendant was a public charitable institution, the object for which it was incorporated being to provide a general hospital for sick and

[24] Duncan v. Nebraska Sanitarium and Benevolent Assoc., 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N. S.) 973, 30 Ann. Cas. (1913 E), 1127. A case very similar to this one was before the New York court. An insane woman was kept in a hospital under a contract to keep a guard in constant attendance for $7 a day. It was alleged that this agreement was violated and that the patient killed herself in the absence of a guard. In endeavoring to sustain the action it was claimed that there existed a contract obligation which had been violated. Said the court: "The contract was to keep a constant watch and guard. It was not to prevent the unfortunate patient from committing suicide. Nor could it fairly be held to be within the reasonable intendment of this contract that the hospital agreed to pay to the husband the value of his wife's life to him in case she did commit suicide. . . . Nor can we see any reason why there should be a different rule where the tortious act which caused death is alleged to be a breach of an express contract from that declared where it is alleged to be a breach of an implied contract, or where no contractual relation at all existed." Duncan v. St. Luke's Hospital, 113 App. Div. 68, 98 N. Y. Supp. 867.

[25] McDonald v. Massachusetts General Hospital, 120 Mass. 432.

insane persons. Its funds were received from grants and donations from the State, from benevolent persons, and from the board of paying patients. While the price of board was placed as low as the funds of the hospital would allow, patients who were received there were expected to pay as nearly as possible according to their own circumstances and according to the accommodations they received. In addition to the accommodations provided such patients, a certain number of free beds was furnished from the general fund of the institution and from donations made especially for this object, the occupants of which were not expected to pay anything. The plaintiff occupied one of these beds. The court in holding the hospital was a public charity and consequently not liable said, "The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. . . . Nor does the fact that the trustees, through their agents, are themselves to determine who are the immediate objects of the charity, and that no person has the right to demand admission to its benefits, alter its character. All cannot participate in its benefits; the trustees are those to whom is confided the duty of

selecting those who shall enjoy them, and prescribing the terms upon which they shall do so."

An effort was made not long ago to get around the reason for the rule by filing in court a paper disclaiming any right of execution against any fund of the defendant corporation held for charitable uses, and asking that the verdict be paid out of funds derived from pay patients. The plaintiff in the case was a pay patient, but the court held that this was wholly immaterial, and in regard to the claim against the funds received from pay patients alone Judge Stewart wrote, "The argument overlooks the fact that every dollar received by the defendant corporation, from whatever source, is stamped with the impress of charity. For what did these patients pay? For accommodations which the hospital was enabled to provide for by the use of money charitably donated to it. The room, the bed, the furnishings and conveniences for which the plaintiff paid are all of them the direct and immediate product of the voluntary donations received. It follows that the money that the hospital receives from its pay patients is as strictly the increment of the charitable donations it has received as would be the interest on the money given it if invested in a loan. If any profit results from this source, it can only be regarded as incidental addition to the trust fund or income." [26]

[26] Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879.

Refusal to concede that a hospital is a charity because it is also a training school for nurses has raised this question for the courts to decide. They have answered that such fact does not change the character of an institution whose primary purpose is charitable. Thus where a hospital was established under statutes providing for the organization of benevolent, religious, scientific, etc., associations, whose charter provided that "the object of this association shall be to conduct and control the institution known as the 'University Hospital' now owned and controlled by the University Medical College, of Kansas City, to provide medical treatment free of charge for the poor, and to train and educate professional nurses, and to confer upon them a degree," the court held, after taking into consideration all the circumstances, that it was a charitable institution and consequently immune from liability to a patient.[27] It has also been decided that the charitable character of a hospital cannot be impeached upon that ground where it appeared that the training of the nurses was a mere incident for which the association was chartered, as it tended to render the hospital more efficient.[28]

Frequently hospitals will be established and

[27] Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453.

[28] Lindler v. Columbia Hospital, 81 S. E. (S. C.) 512.

maintained by corporations employing large numbers of men for the accommodations of their sick and injured employés. These corporations are liable for negligence and malpractice if such hospitals are run for profit.[29] If the motive is not one of gain, they are not responsible, provided due care was used in selecting physicians and attendants.[30] It makes no difference that a hospital of this description is partly supported by the contributions of the employés, and that the assessment is compulsory and is taken out of the men's pay. So where a railroad company made a compulsory assessment of twenty-five cents a month, which it withheld from the pay of its men, but the company itself contributed from two to four thousand dollars, which the court said was a gift of charity, it was held there could be no recovery by a patient for injury occasioned by negligence while a patient in the company's hospital.[31]

Accidents have occurred in connection with the clinical work of medical schools, and attempts have been made to hold them answerable upon the

[29] Sawdy v. Spokane Falls, etc., Ry. Co., 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880.

[30] Union Pacific Ry. Co. v. Artist, 60 Fed. 365; Pierce v. Union Pacific Ry. Co., 66 Fed. 44; Eighmy v. Railway Co., 93 Ia. 538, 61 N. W. 1056, 27 L. R. A. 296; Richardson v. Coal Company, 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338 (mining company case).

[31] Union Pacific Ry. Co. v. Artist, 60 Fed. 365. But see Phillips v. St. Louis Ry. Co., 211 Mo. 419, 111 S. W. 109, 124 Am. St. 786.

ground that their character as charitable organizations has been altered by the fact that such institutions teach medicine for a tuition fee. But once their charitable status has been determined, the rule of exemption operates in their favor, and they are invulnerable.[32] On the other hand, if it does not appear that they are charitable institutions, they cannot escape liability under the charitable rule. So where the hospital in which a patient was injured was an adjunct of a school of medicine and was maintained not only for the advantages it afforded to the students and professors of that institution, but was conducted for profit, the court said that despite the fact that some patients were treated free, the evidence did not show that it was a purely public charity.[33]

The trend of the decisions does not seem to be of a narrowing effect, and the rule of non-liability to patients seems to have been extended beyond wrongs that are merely negligent so as to include acts of trespass or injury done directly by force. This appears from a very late decision of the New York court.[34] The plaintiff came to the defendant

[32] Collins v. Medical School and Hospital, 59 App. Div. 63, 69 N. Y. Supp. 106. See also Gray Street Infirmary v. Louisville, 65 S. W. 11, 55 L. R. A. 270.

[33] University of Louisville v. Hammock, 127 Ky. 564, 106 S. W. 219.

[34] Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92. As to the personal liability of a physician for unauthorized operations, see *The Doctor In Court*, p. 62 et seq.

hospital, a charitable institution, and, after some weeks' treatment for a disorder of the stomach, Dr. B. discovered what proved to be a fibroid tumor. Dr. S., the visiting physician with whom Dr. B. consulted, advised an operation. According to the testimony of the plaintiff, she was advised that the lump could not be properly examined without an ether examination. The following day ether was administered and a tumor removed. The plaintiff testified that while she consented to the examination, the operation was performed without her knowledge or consent. She was contradicted by the two physicians and many attendant nurses. As a result of the operation her witnesses testified that gangrene developed in her left arm, some of her fingers had to be amputated, and her suffering was intense. The hospital was held not liable.

From the foregoing illustrative cases and those cited to fortify the general statement made just prior to fixing our attention upon them, it is quite clear that the courts by repeated decisions have crystallized into well established principles the proposition that a charitable institution is not responsible to its patients for the negligence of its employés in the selection of whom due care was exercised. So long as the purpose of such institutions is benevolent and not to make a profit, it is immaterial that pay was accepted from certain classes of patients. Let us not, however, lose sight

of the rule to which the foregoing is really but an exception—the converse proposition that if a hospital is conducted with a view to making profit, it is liable, and the fact that it does some charitable work does not bring the institution within the doctrine of exemption of charitable organizations. The same courts applying this exceptional immunity to charities will apply the general rule of liability if the circumstances justify it. As was said by the North Carolina court [35] after it had stated the rule absolving charitable institutions, "The rule is otherwise where fees are charged with the expectation and hope of securing gain and profit, and the proprietors of institutions of this class are held to the duty of ordinary care in the treatment and protection of those entrusted to them, and are responsible for injuries resulting from failure to perform this duty."

So in an action for damages against a hospital [36] for the negligent and unskillful conduct of its surgeon in setting a fractured leg, it appeared that

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[35] Green v. Biggs, 167 N. C. 417, 83 S. E. 553. See also Gitzhoffen v. Hospital Ass'n., 32 Utah 46, 88 Pac. 691; Hogan v. Clarksburg Hospital Co. (W. Va.), 59 S. E. 943; Wetzel v. Omaha Maternity and General Hospital Ass'n., 96 Neb. 636, 148 N. W. 582; Stanley v. Schumpert, 117 La. 255, 41 So. 565, 6 L. R. A. (N. S.) 306, 116 Am. St. Rep. 202, 8 Ann. Cas. 1044, Galesburg Sanitarium v. Jackobson, 103 Ill. App. 26, and further see 36 Ann. Cas. 1229 note.

[36] Brown v. La Société Française de Bienfaisance Mutuelle, 138 Cal. 475, 71 Pac. 516.

the hospital was originally a voluntary association, but afterward incorporated "on the basis of mutuality for the treatment of sick members," or, as more specifically provided, for the purpose of securing its members without payment otherwise than of dues, medical and surgical treatment including the services of physicians, surgeons, etc. There were no provisions for assistance to others except paying patients, or sick persons, not members, admitted to treatment for agreed compensation. The court held that these facts showed the association was merely one for mutual profit or benefit and not of a charitable nature. As the plaintiff was admitted to the hospital for surgical treatment upon the terms of paying for the operation fifty dollars, and for a separate room if occupied by him three dollars, or, if occupying the general ward, two dollars a day, and as the operation was performed by the surgeon in chief of the society, the amounts received from the plaintiff going to the society, it was held that this clearly showed that the contract of the plaintiff was with the hospital, and the surgeon was merely its agent or servant. For this reason, and because the hospital was not charitable, it was liable.

In a recent case of interest[37] a non-charitable institution was held liable for injury to a patient

[37] University of Louisville v. Hammock, 127 Ky., 564, 106 S. W. 219.

in its infirmary at the hands of a demented patient in the same institution who was negligently permitted to escape from his room and keeper, wander into that of the plaintiff, and assault and maltreat her. The plaintiff was confined in the hospital of the defendant during a serious illness from which she was nearly prostrated. One M— was on the next day confined in the hospital with delirium tremens. He was left in charge of one female nurse in a room on the floor below that on which the plaintiff had her room. About ten o'clock on the same day M— became so uncontrollable that he overawed his attendant and left the room, passing through the halls of the building upstairs, talking in a loud voice and using profane language. He was a large man, weighing about two hundred pounds and of great physical strength. Entering the plaintiff's room he seized her by the arms, struck and bruised her, dragged her from her bed, and greatly frightened her. He was later captured after some difficulty, securely tied, and confined to his room. He was manifestly violent, uncontrollable, and delirious, and it was known to one of the physicians in charge of the hospital, to its head nurse, and to two other nurses of the institution including the one from whose custody he escaped just before the plaintiff was assaulted by him, that he was confined in the hospital with delirium tremens. Said the court, "This powerful man, crazed from excess of

spirituous liquors, and by reason of that fact uncontrollable and dangerous, was left in an insane apartment in charge of a single woman, who was utterly powerless to restrain him. Under these circumstances, it would seem to a reasonable mind that what happened was to have been expected, if not inevitable."

The proprietor of a private sanitarium was held to be guilty of negligence resulting in the death of a patient where it appeared that an old and helpless man was received at the institution for hire, placed in an upper room of a wooden building, the windows of which he could not open and the only exit from his room being on the hall; that a fire broke out at night, having started at or near a furnace in the basement; that the proprietor of the sanitarium had a watchman employed whose duty it was to watch the fires and protect the premises; that he permitted the watchman to leave the premises and put no one in his place, and that there was no one present to extinguish the fire or to give the alarm.[38]

If a physician operates a hospital for profit in connection with his practice and the institution is unincorporated, he is personally liable for the negligence of the nurses he employs.[39] It may be

[38] Green v. Biggs, 167 N. Car. 417, 83 S. E. 553.

[39] Fawcett v. Ryder, 23 N. Dak. 20, 135 N. W. 800. See *post*, p. 130.

stated, however, that a visiting physician or surgeon who operates at a hospital would not be liable for the negligence of nurses in the hospital over whom he had no authority.[40] Nor would there be liability on the part of an institute which was not connected in any way with the institution in which the alleged negligent treatment happened except a right to have a royalty paid on each patient treated.[41]

Questions regarding the legal character of hospitals have arisen by causes other than those indicated in the cases given, because if a hospital is charitable it not only enjoys exceptional rights in respect to this matter of non-liability for negligence, but in certain other matters as well. In some States public charities are exempt from certain species of taxation. This has resulted in litigation over alleged evasions of taxation, or the abatement of taxes improperly assessed and paid by hospitals. Reference to some of these taxation cases shows that the same circumstances have been taken into consideration by the courts in determining the status of hospitals as in the negligence

[40] Baker v. Wentworth, 155 Mass. 338; Harris v. Fall, 177 Fed. 79. See *The Doctor In Court*, p. 57.

[41] Keely Institute v. Dougherty, 101 Ga. 60, 28 S. E. 511. Where a hospital is operated by an incorporated medical missionary society, and *The Walla Walla Sanitarium* is merely the name of such society's hospital, there could be no judgment against it in that name. Wharton v. Warned, 75 Wash. 470.

cases that have just received our attention. If they are operated for gain, they are not exempt as charities.

Thus an infirmary established and maintained in conjunction with a medical school sought to escape taxation on the ground that it was an institution of public charity and therefore not subject to the tax in question. In rejecting this contention the court said, "Dr. Grant testifies that the institution would not have been established, except that the incorporators hoped to receive pecuniary advantage from it, either directly or through their connection with the college. We have no doubt from the testimony that the professors in the medical college do a great deal of charitable work in the infirmary, yet the real purpose in establishing the infirmary was to make their college more attractive by reason of the instruction and clinical experience received in the infirmary, and in this way to increase the profits of the professors operating the college. Certainly such an institution cannot be exempt from taxation on the ground that it is purely an institution of public charity." [42]

In the case of Philadelphia v. Pennsylvania Hospital,[43] while it was conceded that the buildings and grounds of the hospital were exempt from tax-

[42] Gray Street Infirmary v. City of Louisville, 65 S. W. 1, 55 L. R. A. 270.

[43] 25 Atl. 1076.

ation for the reason that the defendant hospital was a purely public charity, yet it was contended that within the portion of the grounds charged with the claim in the suit there was a large building exclusively reserved for the use of patients paying a higher rate than any others; that these payments much exceeded the cost of maintenance of that particular part of the institution, and that the objects of the trustees in maintaining this department was to make a profit by the use of which to extend the institution's capacity for good among the destitute members of the community. It was not contended nor was there anything to show that there was any actual profit realized in this department after taking into consideration the value of the grounds and improvements and the cost of maintenance. The apparent profit was applied to the general objects of the charity. The court said, "The Pennsylvania Hospital is a purely public charity in the highest and best sense of the term, and under all our authorities we think it is exempt from the species of taxation attempted to be imposed in this case."

In another taxation case [44] where it was sought to abate a tax assessed upon the property of a sanitarium said to be a charity and consequently exempt therefrom by statute, it appeared that it

[44] New England Sanitarium v. Inhabitants of Stoneham, 91 N. E. (Mass.) 385.

was incorporated "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons, at which institution may also be received patients and patrons who are able to pay for the benefits therein received, and which institution shall devote the funds and property acquired, and received by it from time to time, and from all sources, exclusively to maintain itself, improve its conditions and facilities, extending its benefits and usefulness, and facilitating and promoting its purposes by such sanitary, dietetic, hygienic, and philanthropic reforms and efforts, as are generally germane and anciliary thereto; all of said purposes being undenominational, non-sectarian, humanitarian, charitable and benevolent, and in no manner directly or indirectly for profit or dividend paying to any one."

The lands and buildings, together with the furnishings and equipment of the hospital, were paid for by contributions supplemented by loans and mortgages from friends and the entire income from all sources was spent in the furtherance of the purposes of the institution, while its members and officers gave their services. In its advertisements in medical journals and in the pamphlet descriptive of the institution and its methods, while the graduated expenses of board and medical services and nurses were given, there also appeared a state-

ment of its charitable character, and that under its charter all earnings not needed for expenses, improvements and medical appliances were to be devoted to benevolent work. It invited at different prices those who needed rest with mental diversion, and chronic invalids, excluding persons suffering from contagious or incurable diseases and those who were insane or epileptic.

It was found that these facts showed that the sanitarium was occupied and used for the charitable purposes of its corporation and was entitled to the exemption from taxation. The court remarked that a charity is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification which embraces the improvement and promotion of the happiness of mankind without regard to the social rank or pecuniary condition of its members. "It is true," said Judge Braley, "that, while the petitioner by liberally advertising its attractions as a hospital, or sanitarium, with its methods of cure, and a schedule of prices, has succeeded in securing quite an extensive patronage from paying patients, it has not neglected to apply the income derived from all sources to promote the objects for which it was organized."

So far as we have gone we have verified and reiterated the rules of law governing the liability of charitable and non-charitable institutions, and

we have now reached a propitious place from which to commence the examination of the restrictions upon their operation. The first matter petitioning our notice is the limitation or qualification of the charitable rule of immunity to the effect that due care must have been used in the selection of those servants or agents to whom negligence is attributed before the exemption referring to philanthropic organizations may be invoked; that is, unless due care is used in choosing the employés of a hospital, there is no escape from liability for even a charitable institution.

An interesting and instructive decision of the Texas court [45] shows what the law denounces as an improper exercise of the requisite care. The grounds of the suit were in substance as follows: The plaintiff's wife was operated on successfully for a minor affliction by a physician selected by the plaintiff, after which she was consigned to the authorities and nurses in charge of the defendant's sanitarium, where plaintiff had engaged a room with proper instructions as to the care to be used in nursing her, but those in charge of the sanitarium, instead of observing such instructions, immediately after the operation took charge of the plaintiff's wife, who at the time was unconscious owing to the administration of anæsthetics, placed

[45] St. Paul's Sanitarium v. Williamson, 164 S. W. 36 (1914).

her in a bed containing a bottle of hot water in such a manner that the hot-water bottle rested upon the left leg of the plaintiff's wife, and negligently permitted it to remain there until the calf of the leg was almost entirely burned away. The muscles and nerves of the leg were injured, the bone was affected, and it required a number of painful surgical operations, inducing subsequent blood poisoning and great suffering, and seriously and permanently injuring the plaintiff's wife.

It appeared that the defendant was a corporation without any capital stock, and its membership could consist only of Sisters of Charity of a certain society. The purpose of the corporation, as stated in its charter, was to build and maintain a hospital at Dallas, Texas, wherein to administer to the sick, infirm, and afflicted of all nations and creeds and to nurse and care for them and to restore them to health if possible. Such hospital was built and was being maintained when the wife of the plaintiff received her injuries. The hospital received patients who paid for their rooms, care, and nursing and patients who did not pay. None were refused. The only income of the corporation, so far as it appeared at the trial, was from those who paid for the care and nursing to be had at the sanitarium, but this had been sufficient to meet the interest on an original loan and to reduce it materially, and to pay all expenses of maintenance,

which were heavy, and permitted the spending of something on betterments and other allied charities as well. No part of its income was spent other than in charitable and benevolent projects. The institution employed about seventy-five people in various capacities, who were paid. It also conducted a school for nurses. The Sisters of Charity connected with the sanitarium, who managed and controlled its affairs, received only their food and clothing.

The wife of the plaintiff was ill with some trouble that necessitated a minor surgical operation, and acting upon a suggestion from her physician, who was to perform the operation, the plaintiff called at the sanitarium and arranged for his wife to occupy a room there after the operation, for which he agreed to pay and did pay twenty dollars a week and also a charge of five dollars for the use of the operating-room. His wife entered the sanitarium and was successfully operated upon, immediately after which she was given to the care of Dr. B., an interne, and Miss S., a nurse, who placed her upon a stretcher and removed her from the operating-room to the room her husband had engaged for her. Just before the interne and the nurse reached the room to which she had been assigned, Pauline Nash, a girl twelve or fourteen years old, and an employé of the sanitarium, came into the room and placing a bottle of hot water

beneath the coverings of the bed hastily withdrew. The plaintiff was the only person in the room. Very shortly afterward the doctor and the nurse having the patient in charge entered the room with her in an unconscious condition and placed her in bed beneath the coverings. In a few moments they departed, leaving the plaintiff alone with his wife. Soon after, however, Miss F., another employé of the sanitarium, entered the room to attend the patient. About twenty minutes after this the body of the patient and especially the left leg began twitching and jerking, which attracted the attention of the plaintiff. While he and Miss F. were regarding the patient to ascertain the trouble, she exclaimed, "Oh, my leg!" This she repeated in a short space of time. Miss F., at the direction of the plaintiff began to investigate, placing her hand under the covers but jerking it out immediately, and then raising the bedclothes she seized the hot water bottle and quickly removed it. It was so hot that Miss F. could not retain it in her hand. The evidence deduced at the trial amply sustained the allegations of the petitions which has been set out.

"The evidence in the record," said the court, "shows that it is customary, usual, and proper to warm beds intended for occupancy by patients undergoing operations by placing a bottle of hot water therein; the purpose being to increase the lowered

circulation of the patient due to the operation. It is not proper, usual, nor customary to place in the bed a bottle of hot water so hot that it will burn the flesh of a patient in case of contact. The water placed in the bed occupied by appellee's wife was that hot. If it is hot enough to burn the flesh, it is usual and customary for those in charge of a patient to either cover the bottle with the clothes, remove same from the bed, or see that it does not come in contact with the patient. It is the duty of the nurses in charge of the patient to look after the placing properly of the bottle of hot water and to protect the patient against injury by contact in case the water is too hot. Neither Miss S., who had charge of the appellee's wife when she was placed in the bed, nor Miss F., who took charge of her after being placed therein, were graduate nurses. They were pupil nurses, who are intrusted with such duties as the Sister in charge of the floor to which they are assigned thinks them capable of attending to. The girl, Pauline Nash, who placed the bottle of hot water in the bed to be occupied by the appellee's wife was employed to wash dishes and run errands. Sister DeS., a Sister of Charity, and a member of appellant corporation, had charge of the floor on which appellee's wife had been assigned a room, as well as all the patients occupying rooms on that floor. Before removing appellee's wife to her room, a request came from the opera-

ting room for a bottle of hot water to be placed in her bed; the request being made to Sister DeS., who testified in reference thereto, 'I gave a general order in the diet kitchen for some one to do that, without speaking to any one in particular. . . . just told them to put a hot-water bottle in No. 11, being too busy to do it myself.' Pauline Nash, who was employed in the diet kitchen, where the order was given by Sister DeS., as we have stated, executed the order given by Sister DeS. It was also in evidence in substance that Pauline Nash was also permitted to place bottles of hot water in beds of patients at the sanitarium, and that she was not competent for that purpose. Appellee's wife also testified that Pauline Nash confessed to her at her bedside, the day after she was injured, that she placed the bottle of hot water at the direction of the head nurse or Sister. Drs. T., S., and W., all of whom had practised at the sanitarium and had opportunity to observe Sister DeS., gave it as their opinion that Sister DeS. was a competent nurse; also that it would be improper to place a bottle of hot water hot enough to burn the flesh so that it would come in contact with the patient. Nothing concerning the competency of Miss S., Miss F., or Pauline Nash was proven by these physicians, or others."

The court, after stating the proposition that such institutions with respect to patients within their

walls or under their care, whether the patient be one of charity or one who pays, are liable for the negligence of their physicians, nurses, and servants only when it appears that ordinary care has not been exercised in their selection, then proceeded as follows: "According to the testimony of all the witnesses who possessed any knowledge on the subject, while it was necessary and usual to place the bottle of hot water in the bed, it was attended with more or less injury to the patient if managed improperly. From which it follows that it was the duty of those directing the placing of the bottle to have selected no person to perform that task not competent to anticipate injury to the patient by reason of the water being too hot. Pauline Nash, selected to perform the duty, was not only not competent but wholly inexperienced, and we think her selection by Sister DeS., a member of the corporation, to perform the task is alone sufficient to sustain the finding of the jury for the plaintiff. It may be argued that Sister DeS. did not select Pauline Nash. This Sister testified that she was too busy to do it herself and gave a general order in the diet kitchen, where Pauline Nash was employed to wash dishes and run errands, for someone to perform the task. Conceding all that was done was to give the general order, such a method of selecting a servant to do work can hardly be said to be the exercise of ordinary care."

It must be kept steadily in view in applying the foregoing principle that there is a distinction between the act of the employé and the negligence of the hospital itself in selecting the employé, because it is only the latter which creates liability.[46]

There is another restriction upon the general rule of exoneration that is of paramount importance. Our investigation has thus far established the proposition that the immunity of charitable hospitals covers cases involving injury to *patients* or *inmates* occasioned by the negligence of the officials and attendants. But let us suppose that instead of being a patient or inmate, the injured person is an employé or another person. In such a case would the charitable rule operate in favor of the hospital? Upon this point there is a diversity of opinion. Some courts deny the liability of charitable hospitals regardless of the relation they bear toward the injured person,[47] while others limit the operation of the rule to patients or inmates.[48] It apparently depends to some extent upon what grounds the courts take in deciding that charitable institutions are not answerable to patients or inmates. It would seem as if the theory that the

[46] Hoke v. Glenn, 167 N. Car. 594, 83 S. E. 807.

[47] Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141.

[48] Hewett v. Woman's Hospital Aid Association, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496.

funds of the charity are a trust and cannot be diverted to extraneous uses if carried to its logical conclusion would preclude from recovering damages any person regardless of whether or not he is a patient, but the courts have not always been consistent in this matter. The better rule is the one that operates only in favor of those accepting the benefits of the charity, that is, patients and inmates, for to deny liability in all cases is to place charitable institutions above the law. This last rule seems to have gained the stronger foothold.

The reasoning of the New Hampshire court in the case of Hewett v. Woman's Hospital [49] upon this matter seems sound and the conclusion reached preferable. In that case a nurse sued the hospital association because it permitted her to attend a diphtheria patient without disclosing to her the nature of the patient's disease, and she became infected without fault on her part. The evidence tended to show that one of the patients whom the plaintiff nursed had a form of diphtheria; that a culture taken from this patient and examined by a bacteriologist contained diphtheria bacilli, and that Mrs. R., the physician in charge of the patient and manager of the hospital, was duly informed of the results of the examination.

In behalf of the court Judge Walker said, "The

[49] 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496.

duties of the defendant to the plaintiff when she was employed to nurse a diphtheria patient had their inception in the contract of employment. She was engaged to do a necessary part of the work of maintaining a hospital for the sick. For this labor she was paid. If she was an apprentice receiving small remuneration in money, in consideration of the instruction and experience she received in practical nursing, she was none the less an employé of the defendant. An apprentice learning a trade occupies the position of a servant with reference to his employer, and obviously the duty of the latter to inform him of the dangers of his occupation is greater than in the case of an experienced workman. While performing the necessary work of nursing in the institution, the plaintiff was not, like the patient, the recipient of the defendant's charity. She was doing the defendant's proper work, under its direction and for its benefit in the discharge of its assumed duty. She was as much an employé of the hospital in respect to this particular work as she would have been if she had been a graduate nurse receiving full nurses' pay . . .

"If she had been employed by an individual to attend a member of his family afflicted with smallpox of which he had knowledge, but of which he did not inform her, and she took the disease without fault on her part and suffered damage therefrom, it would not be seriously denied that he was guilty

of actionable negligence in not informing her of the danger to which he exposed her. It was his duty arising from his employment of her, or from the contractual relation of master and servant existing between them, to warn her of the danger incident to the service which he knew or under the circumstances ought to have known, and of which he knew she was ignorant, though in the exercise of ordinary care. . . . To say that a similar duty was not imposed upon the defendant for the benefit and protection of the plaintiff, because it is a charitable corporation, is to relieve such corporation from the reasonable obligation of exercising the care ordinarily required of, or contractually assumed by men in general in the prosecution of their legitimate business."

We have spoken in a prior chapter of the interest of government in the good health of its citizens; also of the distinction between public and private corporations. In the exercise of its police power the state has jurisdiction over health matters, and in the observance of its duty in this respect it frequently establishes hospitals, either directly, as in the case of state insane hospitals, or indirectly through its various agencies performing governmental functions, as in the case of municipal hospitals. State and municipal hospitals are almost without exception incorporated, and in such circumstances are public corporations, because, as

you will recollect, a public corporation is of a political nature in that it is carrying on the business of government.

The hospitals just mentioned are government instrumentalities, and, like charitable institutions, are free from liability for the acts of their servants.[50] Yet their exemption is not based upon the fact that perhaps they are charitable, but upon the well-bottomed principle that the sovereign is immune from suit, and to commence proceedings against an agent of the government would be in effect suing the state itself. "The king can do no wrong," says the old maxim, which was brought over as a part of the common law of England by our forefathers in colonial days, and survives in the rule that the nation and the sovereign States thereof cannot be sued without their consent. The justification of this is found in the legal notion that all judicial authority comes from the king or sovereign, no court having jurisdiction over him or the state.

There can be no doubt but that the state has power to create a corporation to carry on special kinds of work for its own benefit or in the interests of the public; and where this power is exercised,

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[50] Maia's Adm'r. v. Directors of Eastern State Hospital, 97 Va. 507, 34 S. E. 617; White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454; Benton v. Trustees of Boston City Hospital, 140 Mass. 13.

the institution thus established is in every sense a State institution. This may be the case with a hospital. It would be immaterial that one so created was managed and its affairs administered under supervision of trustees—its character as a governmental agent would not be thereby changed.[51] On the other hand, a hospital does not become a *State* institution from the fact that it is under legislative control, because all institutions and corporations created for public purposes are subject to be thus governed.[52]

It is of course a hardship for an inmate of such a hospital to suffer injury from the negligence or misconduct of the persons employed therein, but the courts do not countenance the remedying of this hardship by giving damages at the expense of the other inmates of the hospital or of the taxpayers of the State, and accordingly they leave the injured person or his representative to his remedy against those by whose negligence the injury was caused.[53]

It must be noticed in regard to municipal hospitals that a municipal corporation has a sort of Jekyll-Hyde personality. In one class of matters it acts purely as a political agent of the State, exercising governmental functions; in the other class

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[51] White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454.

[52] Chalfant v. State, 37 Ohio St. 60.

[53] Maia's Adm'r. v. Directors of Eastern State Hospital, 97 Va. 507, 34 S. E. 617.

of matters it acts in a private corporate capacity for its own special benefit. This dual personality is worthy of observance, because in the former case it acts as an instrumentality of government and consequently is not liable; in the latter case it is responsible as a private corporation. Judge Dillon, in his work on municipal corporations,[54] writes as follows:

"The power, or even duty, on the part of a municipal corporation to make provision for the public health and for the care of the sick and the destitute, appertains to it in its public, not in its corporate, or, as it is sometimes called, private, capacity; and, therefore, where a city, under its charter, and the general law of the State enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employés therein."

The particular privilege of non-liability accorded to associations established and operated by the State extends not only to patients but to employés and strangers as well. As to this class of hospitals or these governmental agencies the law is well established that they are not liable under any circumstances, although in the case of private associations, as we have seen, there is a sharp conflict

[54] Dillon, *Municipal Corporations*, secs. 977, 981, 982, 989.

on the question of liability to employés and strangers. We then saw that reason sustains the rule of liability in those instances, because to hold otherwise would be to place such institutions above the law; this objection, however, is not available against the agencies of the government because in legal theory the sovereign or state is superior to the law.

The rule then is that where a city under authority of law establishes a hospital, it is not liable to persons injured by the misconduct of its agents and employés therein.[55] If the purpose be charitable, then the city is not liable for the negligence of its employés in the institution, or if its purpose is to provide for the general health and welfare and to provide for suppressing and preventing the spread of contagious or other diseases, the law authorizing the city to acquire and maintain the hospital must be regarded as an exercise of the police power, and a city is not liable for the negligent acts of its agents or servants engaged in executing, enforcing or giving effect to its ordinances and regulations pertaining to the health, safety, and welfare of the public.[56] Even if a city unlawfully maintains a hospital for revenue, it is not liable for the negligence of the hospital employés.[57]

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[55] City of Richmond v. Long's Adm'rs., 17 Gratt. (Va.) 375.
[56] Tollefson v. Ottawa, 228 Ill. 134.
[57] *Ibid.*

There is a class of cases relating to hospitals in which the courts do not hesitate to intervene, whether the institution be charitable or an agency of government. While, as we have seen, such hospitals enjoy extraordinary privileges in certain matters, there is a limit beyond which they cannot go, and a hospital though not in itself a nuisance may become so, in which event the courts will grant relief to those who are injured thereby.[58] Even though the work engaged in is philanthropy of the highest order, the law will not permit it to be conducted in such a manner as to become an intolerable nuisance to those who are in nowise responsible for its location and operation;[59] and whatever immunity a municipality may have in exercising a public as distinguished from a strictly corporate power, the infliction of an injury upon another is neither the natural nor the necessary result of an exercise of the right to build a hospital.[60] To so use the property of the state as to deprive a person of the use and enjoyment of his land, would be not less a wrong and injury than to oust him forcibly of possession and lawlessly take and appropriate it. The maxim *sic utere tuo ut alienum non lædas*

[58] Kestner v. Homeopathic Medical and Surgical Hospital, 245 Pa. St. 326, 91 Atl. 659. As to the right of a private person to maintain a hospital, see *post*, p. 131.

[59] Baltimore v. Fairfield Improvement Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494.

[60] *Ibid.*

—use your own property in such a manner as not to injure that of another—cannot be disregarded by officers of the state any more than by a private person.[61]

The answer to the question as to what constitutes a nuisance is that it is dependent upon the facts of the particular case. Probably the greater number of cases upon this matter have involved pest houses. It is perfectly obvious that a contagious hospital located on the outskirts of a city is less likely to injure a person than one situated in the heart of the city, although another kind of hospital might be maintained without offence in a thickly populated section. It is a question of fact depending upon the circumstances of the given case.

Thus in a case where it was sought to isolate a leper at a certain place which was objected to by property owners in the neighborhood, the court said, "Leprosy is, and has always been, universally regarded with horror and loathing, and it is conceded to be an incurable disease. In past ages its unfortunate victims, shunned and avoided by their fellow-men, viewed by all with superstitious dread, wandered about the open country, naked and starving. Hospitals for the relief of those smitten with the terrible malady seem to have

[61] Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458. For the duty of trustees of a hospital with regard to the conduct of their institution, see *post*, p. 76.

been unknown in antiquity. The sufferers were evidently isolated in villages occupied by them exclusively. With the tide of emigration westward during the decline of the Roman Empire, leprosy was spread over Europe, and in the Middle Ages it prevailed to an alarming extent, its principal ravages dating from the Crusades. The influence of Christianity tempered the rigor of the affliction, and as early as 583 the Third Council of Lyons directed the bishops of each city to feed and support the lepers at the expense of the Church. In the thirteenth and fourteenth centuries, hospitals and asylums were numbered by hundreds in almost every country. But, whether isolated in villages in the East, or segregated in hospitals in the West, the leper was completely and forever an outcast, being both legally and politically dead. The advance of civilization, while in a measure ameliorating his condition, and checking the spread of the pestilence, stripped the disease of none of the dread with which it had always been regarded by the great majority of mankind. The horror of its contagion is as deep-seated to-day as it was more than 2,000 years ago in Palestine. There are modern theories and opinions of medical experts that contagion is remote, and by no means dangerous; but the popular belief of its perils, founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its

ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot, in this day, be shaken or dispelled by mere scientific asseveration or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious, but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do serious injury to the property of the plaintiff there located. As to this the record leaves no doubt."[62]

In every large city accidents frequently occur, and often they are of such a nature that the immediate attendance of a surgeon is imperative. It may be important to get the person to a hospital at once. An ambulance is used. Time is an important element in emergency cases. In haste the ambulance itself may become involved in an accident. Was it at fault in going at extraordinary speed? Had it the right of way? In short, what are the rights and responsibilities of such vehicles? Briefly and not inappropriately we may notice here the attention the law has paid to the *hôpital ambulant*, to this part of the equipment of so many hospitals.

"An ambulance," said Judge Collins, of the

[62] McSherry, Ch. J., in Baltimore v. Fairfield Improvement Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494.

Minnesota court, "is a wheeled vehicle used for the purpose of conveying sick and wounded persons."[63] Conservation of the public health dictates the necessity for many municipalities to maintain an ambulance service, and this may quite properly be done under the police power, which, as we have recently seen, a municipality may exercise as an agency of the State government. Some cities manage their own service through their police departments, while others intrust it to hospitals. Recognition of the importance of the work of the service is to be observed in the enactment of statutes and ordinances giving rights to ambulances not enjoyed by other traffic. These laws are analogistic to the rights of fire departments, and form so considerable a body of local law that no attempt to colate them can be made profitably here.

The mission of an ambulance does not in itself justify its being driven at an excessive rate of speed or give it the right of way. The public interests do not demand that, in order to afford prompt relief to one person requiring the use of an ambulance, other persons may be run down and injured by the reckless rate of speed of the ambulance in going to the assistance of the injured person;[64] and an ambulance comes within the scope

[63] Kendall v. Duluth, 64 Minn. 295.

[64] People v. Little, 86 Mich. 125, 48 N. W. 693.

of a city ordinance prohibiting the driving of vehicles through the streets faster than a certain rate of speed, and the effect of such ordinance is not changed by a subsequent ordinance giving an ambulance the right of way.[65] But a law entitling an ambulance to the right of way will give the driver the right to assume that others will pay proper heed to the ringing of the ambulance bell or other warning,[66] and their failure to take notice of such signals is negligence.[67]

Inasmuch as a municipality in supplying ambulance service does not do so for its own special advantage or profit, but in so doing is performing a service essential to the welfare of its people as an agency of the State, it is exempt from liability under the rule heretofore noted.[68]

In the case of a hospital operating an ambulance and injuring some person or property, we are brought back to the old rule regarding charitable and non-charitable institutions. If the hospital is not charitable, it is liable for the negligence of its servants or agents under the doctrine of *respondeat superior*. A charitable institution is not generally

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[65] *Ibid.*

[66] Byrne v. Knickerbocker Ice Co., 4 N. Y. Supp. 531.

[67] Smith v. American Society, 7 Misc. (N. Y.) 158.

[68] See *ante*, p. 60 et seq., Maximilan v. Mayor, etc., of New York, 62 N. Y. 160; Noble v. Hahnemann Hospital, 112 App. Div. (N. Y.) 663, 98 N. Y. Supp. 605. Cf. Green v. Eden, 24 Ind. App. 583. See also 38 L. R. A. (N. S.) 481 note.

responsible for injuring its patients, but there is a conflict as to the liability of benevolent establishments to employés and third persons. It would seem that damage and consequent liability caused by an ambulance maintained by a charitable hospital would depend upon the side taken by the court having jurisdiction upon the question of the extent to which the charitable rule of exemption applies.[69] A municipal hospital with no financial benefit accruing therefrom is not liable under any circumstances to anyone.[70] Where a hospital has a contract with a municipality to furnish the city ambulance service the circumstances might be such that in so representing the city it would be considered the agent thereof and immune from responsibility.[71]

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[69] See *ante*, p. 57. Noble v. Hahnemann Hospital, 112 App. Div. (N. Y.) 663, 98 N. Y. Supp. 605; cf. Green v. Eden, 24 Ind. App. 583.

[70] See *ante*, pp. 62-64.

[71] Noble v. Hahnemann Hospital, 112 App. Div. (N. Y.) 663, 98 N. Y. Supp. 605. But see the case of Green v. Eden (24 Ind. App. 583) where an attempt to escape liability by showing a contract with the city to keep an ambulance and furnish the horse and driver to answer calls coming through the city dispensary failed because the driver of the ambulance was not considered a servant of the city.

For the law relating to military ambulances see *post*, p. 155.

CHAPTER III

OFFICIALS AND ATTENDANTS

A hospital is or should be a place with superior facilities for the care and treatment of afflicted persons. That this was not at one time the case is a revelation of the history of such institutions. We frequently see survivals of the old prejudice that this caused, but the modern hospital has advanced with the science of which it is an instrumentality, and it is so no longer. At any rate it has been almost entirely overcome by hospitals justifying their existence in this very matter of surpassing all other places for treating the sick and injured. It is not to be denied that the chief end of these institutions must be the accomplishment of this result; it must be the inducement to persons to resort thereto. The attainment of this object cannot result from superiority of equipment alone, but it must needs be the outcome of the work of the officials and attendants. A want of due care on the part of a physician, or of a nurse, or other attendant may plunge the hospital into embarrassing litigation and cause unpleasant publicity. The success of a hospital ultimately rests therefore

with the personnel of its officials and attendants: the institution's reputation for better or for worse is equally dependent upon each individual.

Mr. Chief Justice Breaux, of the Louisiana court, speaking in a case where an attendant in a sanitarium was careless and did not follow the directions of the attending physician, but improperly administered medicines resulting in injury to the patient for which damages were recovered in a suit against the hospital—the Chief Justice said, "A nurse should exert her best endeavors to avoid mistakes of any kind, as they are sometimes attended in a sick room with the saddest consequences. . . . The functions of the nurse are sufficiently important to render her and her employers liable in damages for inflicting pain negligently. . . . Her duty was to carry out the orders of this physician, and it was the duty of the sanitarium to see that she carried out the order devolving on her as nurse."[1]

However, a nurse or hospital would probably not be liable for a failure to use the very highest degree of care, although legal liability would undoubtedly result from non-observance of the care which a trained and skilled nurse would ordinarily exercise in the circumstances.[2] Yet, as was stated

[1] Stanley v. Schumpert, 117 La. 255, 41 So. 565, 6 L. R. A. (N. S.) 306, 116 Am. St. Rep. 202, 8 Ann. Cas. 1044.

[2] Cf. Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7.

by the court in the last paragraph, a nurse should, of course, discharge her high responsibilities to the very best of her ability and guard carefully against mistakes. This the nurse is morally, though perhaps not legally, bound to do.

We have selected as a concrete illustration a common case among those reported in the books.[3] A patient in a hospital was burned and scalded by a hot-water bag while unconscious. The trial court instructed the jury in effect that when the nurse applied the hot-water bottle to the feet of the plaintiff, exercising ordinary care in the manner in which the same was placed, she was absolved from all further care and attention in relation to the patient as to the effect produced by the application of the hot-water bottle. This sought to restrict that care and attention to the moment of time when she was applying the remedy and excluding all subsequent care and attention, which the court held to be erroneous, expressing itself as follows:

"To place a hot-water bottle of such high temperature upon the feet of an unconscious man as would burn or scald the feet cannot be said to be a proper way of doing such a thing. The duty of a nurse, and assuming that a nurse must only exercise the ordinary care which a trained and skilled nurse would be required to use, is a continuous

[3] Williams v. Pomona Valley Hospital Ass'n., 131 Pac. (Cal.) 888.

duty. Dealing, as she does, with an unconscious patient, unable to care for himself, it was her duty to observe the effect upon the patient of the application of the remedy as much as it was to test its temperature in the first instance. The powers of resistance, the condition of the patient, must of necessity have much to do with application of remedies, either by a physician or a nurse, and this duty could only be observed by constant and unremitting care and attention, which is just as obligatory upon the nurse as is the duty of applying the remedy directed by the physician in charge."

While a nurse or other attendant owes the duty to patients of exercising care, there is in turn a duty on the part of the hospital not to injure negligently its employés. We gave consideration elsewhere to the rules governing the liability of health institutions, and the sum of the whole matter there investigated is this: Ordinarily a hospital is liable for the negligence of its employés, but if the institution is charitable, the law absolves it from liability for the negligence of its employés in whose selection due care was used, although some courts extend the rule and deny the responsibility of such institutions in all cases, thus putting them upon the same footing as State institutions which are exonerated under all circumstances. But it may be said generally that hospitals are responsible to their employés, and to permit a nurse to attend a patient

known to be suffering with a contagious disease without disclosing this fact to the nurse is for the hospital to incur liability if the nurse contracts the disease without fault.[4]

It is the duty of the administrative board of a hospital to see that it is conducted in such manner that the lawful rights of others are not infringed. The trustees, or commissioners, or directors are responsible for the management of their institution; and it is no answer to a complaint that a hospital is a nuisance for them to say that they did not know it was being conducted in an offensive manner, and had they known of the condition they would have minimized the evil so far as possible.[5]

From the legal point of view it is highly important that the maximum of care be exerted in the keeping of complete and accurate hospital records. Dereliction in this matter by the officials and attendants to whose hands this duty is committed is fraught with imperilment and may lead to disagreeable eventualities. It is not possible to foresee when these records may become important; one

[4] Cf. Hewett v. Woman's Hospital, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496, *ante*, p. 58. Under the English Workmen's Compensation Act (6 Edw. VII, c. 58), a hospital attendant who contracts a disease is not considered as having suffered injury by accident to entitle him to compensation.—Halsbury's *Laws of England*, vol. 23, p. 361.

[5] Deaconess House and Hospital v. Boutjes, 207 Ill. 553.

case is as of much moment as another in this regard, and the slightest negligence or carelessness or indolence is reprehensible to an extreme degree. A considerable duration of time, even years, may elapse before they become of consequence. A defect or mistake in one part may destroy the evidential weight of the whole record, for an imperfect record is inadmissible.[6] The necessity for this care is not always visible. For this very reason it is important to keep this in mind, and to be extremely careful at all times and in all cases.

In making a record of this character which shall be admissible in evidence it is necessary that the entries be made *contemporaneously* with the facts to which such entries relate. But the term contemporaneous is not to be construed to mean that the record must be made at the very moment of the occurrence, although it should be made within such time thereafter as would reasonably make it a part of the transaction. The record must be kept in a regular manner in the course of the hospital's business.[7]

In a late case[8] a hospital record was offered in evidence to show that the plaintiff, who was suing for personal injuries sustained in an automobile accident, behaved in an unruly manner while

[6] Cashin v. N. Y., N. H. & H. Ry. Co., 185 Mass. 543.
[7] Ribas v. Revere Rubber Co. (R. I. 1914) 91 Atl. 58.
[8] *Ibid.*

in the hospital for treatment and disobeyed the positive orders of the surgeons and nurses as to keeping quiet and refraining from movements which would be likely to interfere seriously with the proper adjustment and knitting together of the fractured bone. From the evidence it seems it was the rule of the hospital that a record should be kept showing among other things the condition of the patient when received, his treatment while there, his condition from time to time, denoting the progress toward recovery or otherwise as the case might be, and of such other matters as might have a bearing upon the case or furnish needed information. This record was made up every three days and the method was the one employed at the hospital. It was claimed by the plaintiff that the records were not made *contemporaneously* and that they should have been excluded, but the court took the opposite view of the matter and held that taking into consideration the regular method in which these records were made and the apparent impracticability in a hospital of recording each event as it occurred, the facts relating to the plaintiff were recorded within such reasonable time as would make them a part of the transaction and therefore *contemporaneous* within the meaning of that term. They were entries made in the regular course of business at the hospital and at the times and in the manner there in vogue.

The court further held that the fact that the recording officer made the entries embracing some matters which did not come under his own personal knowledge but were communicated to him through doctors and nurses connected with the case, did not affect the admissibility of the record,[9] although it has been judicially determined that such records unless supported by the testimony of the one who made them, if that person is still alive and capable of being produced to testify, are not admissible.[10]

It is as important for a physician and surgeon to keep full and accurate records made as quickly as possible after the happening of the events registered as it is for the hospital so to do.[11] The practitioner should keep copies of the hospital records of cases under his charge for his own private use. It is of as much moment for the individual to exercise care in these matters for his own protection as it is for the hospital to safeguard itself. Of course, when the relation of physician and patient

[9] But see dicta in the case of Price v. Insurance Co. (90 Minn. 264, 95 N. W., 1118), to the effect that this would be a violation of the rule against hearsay evidence.

[10] Cashin v. N. Y., N. H. & H. Ry. Co., 185 Mass. 543; Baird v. Reilly, 92 Fed. 884.

[11] For discussion of this matter in relation to the individual physician in his private practice, the use of notes by the medical witness, the form of such notes, and confidential communications between physician and patient, see *The Doctor In Court*, pp. 6-18, 96-107.

exists it is one of trust and confidence, and, while at common law a physician was obliged to disclose information acquired in his professional capacity if called upon in court to do so, there are now in a great many jurisdictions statutes protecting the individual from such disclosures.[12]

This brings us to the question of whether or not hospital records are privileged or confidential communications in those jurisdictions where such disclosures, denied protection by the common law, have been made sacred by statute. There is a singular lack of cases upon this point, but their absence from the books is significant, and it may be safely assumed that, under the general rules established by the courts interpreting the statutes which place the seal of silence upon these communications, hospital records are privileged and immune from disclosure. It makes no difference so far as the physician's disqualifications are concerned whether he acquires the confidential communication from a pay patient in a private residence or hospital, or from a charity patient in a public hospital.[13]

But the question as to the admissibility of a hospital record was before the court for adjudica-

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[12] Cf. *The Doctor In Court*, Ch. v.

[13] Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N. S.) 565.

tion in the case of Smart v. Kansas City,[14] which was a suit for damages against the municipality for personal injuries occasioned by a defective coal hole. The plaintiff, a woman, claimed that the amputation of one of her limbs was the direct consequence of the accident, which occurred on February 18, 1898. It was admitted that four or five years before this she had fallen while skating and had had trouble with the limb which was amputated after the accident at the coal hole, and the records of the hospital at which she was treated both before and after the accident were offered in evidence at the trial.

Dr. F. C. Frederick testified for the defendant substantially as follows: "I am in charge of the records of the city hospital; have been employed there since 1892; have kept the records for the last five years; have the official records with me, kept in accordance with ordinances of the city; have examined them with reference to the dates and circumstances pending confinement of Stella Smart at the City Hospital; the first date of admission being May 26, 1895; she was in the hospital at that time until June 14, 1895; the diagnosis of that was tuberculosis. (Plaintiff objects to the diagnosis because it is not a part of the records of the hospital.)

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[14] 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N. S.) 565.

"Q. Is the diagnosis a part of the record?

"A. Yes, sir; it is on the record book, the same as the other part.

"By Mr. Williams: I now ask the witness the question as to the diagnosis.

"By the court: I don't know who made it.

"A. The surgeon in charge.

"By the court: Did he tell you about it?

"A. No, sir; it was just put on the record.

"By the court: Who put it down?

"A. The house surgeon.

"By the court: You don't know whether it was correct or not?

"A. No, sir; whatever he put down was correct so far as I was concerned. . . . The next time she was in the hospital was April 8, 1896, and she was discharged May 18, 1896, being the third time.

"A. She was in the hospital until the 10th of September, 1896. The next time she was in the hospital was March 15, 1898, her leg being amputated April 13th; she was discharged September 19, 1898.

"Q. Doctor, I will get you to state again how the diagnosis of the various cases is put on record. State whether or not it is done in every instance?

"A. It is a regular duty performed by the house surgeon. Whenever he sees a case and satisfies himself. . . .

"By the court: What the doctor wrote on the book is not admissible for two reasons.

"By Mr. Williams: You mean it is a privileged communication, confidential information, and we can't prove it?

"By the court: Yes, sir; if he gets it from the patient.

"Q. Your understanding is that the diagnosis is first made by the physician in attendance, and that he copies that diagnosis, and it is written down by the physician in that record? . . .

"By the court: He means what really occurs.

"A. That is the process in each case."

The offer of this evidence was excluded because the entries made were privileged communications, first made to the attending physicians in order that they might correctly diagnose the patient's case and administer proper treatment. The higher court held that this was correctly done, as hospital physicians who treat patients at a hospital cannot testify as to what they learned while attending there and it must follow as a natural sequence that when the physician subsequently copies that privileged communication upon the record of the hospital, it still remains privileged. "If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit, and the statute

nullified, by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered in evidence containing the diagnosis, and thereby accomplish, by indirection, that which is expressly prohibited in a direct manner."

As to the ordinance requiring such record to be kept, the court said, "The mere fact that the ordinance of the city requires such a record to be kept is no reason on earth why the statute regarding confidential communications should be violated. That record is required to be kept for the benefit of the institution, and not for outside litigants. . . . The object of the statute is to guarantee privileged communications between all patients and their physicians; and it is wholly immaterial whether they are in or out of hospitals.[15]

However it must be kept in view that hospital records are not excluded from evidence as being privileged except in those States which have enacted statutes in derogation of the common law rule that there is no privilege between physicians and patients. It may therefore be stated generally that at common law such records are admissible,

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[15] It has been held that hospital records are not admissible as *public documents*. In re Hock's Will, 129 N. Y. Supp. 196; Massachusetts Mutual Life Insurance Co. v. Trustees of Michigan Asylum for the Insane, 178 Mich. 193, 144 N. W. 538; Connor v. Metropolitan Life Ins. Co., 78 Mo. App. 131.

but the rule is otherwise where statutes have made such communications confidential.[16]

In casualty cases detailed information should not be given to third persons who may be legally interested in the patient's case, although such information, if not made confidential by statute, may be learned by the interested person bringing the records into court by legal process.

There is a further matter of which officials and attendants should take notice, as its legal aspect is important. We refer to autopsies and post-mortem examinations. Although the interests of science are furthered by such investigation and it is to be greatly regretted that there is a popular prejudice against and misunderstanding of them, it should not be forgotten that a human body is as inviolable after death as before. A patient entering a hospital cannot be operated upon without his consent. To do so is for the operator and the hospital to incur liability. If a patient dies, consent to perform an autopsy must be obtained from the dead person's next of kin, a failure to do so constitut-

[16] The following States have statutes giving the privileges: Arizona, Arkansas, California, Colorado, District of Columbia, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New York, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

For discussion of cases upon these statutes, see *The Doctor In Court*, ch. v.

ing good grounds for an action against the hospital.[17]

These actions have been resisted upon the theory that there is no right of property in a dead body, but it would seem that the courts have recognized the rights of the deceased's relatives, and it is now well settled law that a recovery may be had for any unlawful mutilation of the corpse.[18] The person entitled to the custody of the body is entitled to it in the condition in which it was when death supervened,[19] and if it is unlawfully dissected, damages may be recovered by the relatives for "wounded feelings and mental distress."[20] It may subject the offender to proceedings of a criminal nature, because it is sometimes, as in New York,[21] made a misdemeanor by statute for a person to make, or cause, or procure to be made, any dissection of the body of a human being, except by authority of law, or in pursuance of a permission given by the deceased.

There are certain circumstances, however, where an autopsy is justified. When death is sudden and it is not possible to ascertain correctly the cause

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[17] Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695; Burney v. Children's Hospital, 169 Mass. 57.

[18] *The Doctor In Court*, pp. 69-72.

[19] Foley v. Phelps, 1 App. Div. (N. Y.) 551.

[20] Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695.

[21] Penal Law, sec. 2214, Consol. Laws, 1909, ch. 40; cf. Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695.

thereof without a post-mortem examination, such investigation is then lawful for reasons of public policy and there would of course be no liability provided it was conducted in a scientific manner. Yet the law in such instances usually designates the person who shall conduct the examination. Never should an autopsy be undertaken until the unmistakable consent of those to whom the body belongs has been obtained, and one should not be led to believe one may safely undertake a post-mortem because the patient has apparently no relatives who may complain.

Another matter concerning which we would sound the tocsin is that pertaining to the admission and discharge of hospital patients. It need hardly be said that a person cannot be held in a hospital without his consent, unless he be detained there by process of law, as in the case of insane persons legally committed or persons quarantined with a contagious disease. One cannot be lawfully placed in an asylum against his will unless actually insane, though the confinement of a person dangerously insane is always justifiable.[22] It is a serious matter to restrain a man of his liberty illegally, and in those cases where a set procedure is prescribed by law it should be adhered to most strictly. The signing of a mere agreement on the part of a

[22] Van Deusen v. Newcomer, 40 Mich. 90.

voluntary patient upon entering an inebriate asylum to stay there a year does not give the officials of such institution the right to keep the patient there by force; for a person making a contract which deprives him of his liberty cannot by force be compelled to perform it, and such a contract will not be specifically enforced by the courts.[23] A certain hospital in Philadelphia was held not to be justified in detaining a seaman injured by exposure on a British vessel, who was admitted to the institution for treatment through the offices of the British consul, in spite of the fact that he was not fully cured when he asked to be discharged, that his release would probably result in his becoming a public charge, and that the master of the vessel had given directions that the injured seaman should be detained until arrangements could be made to return him to the port whence he had shipped.[24]

On the other hand, the circumstances might be such that a hospital would be considered remiss in its duty by prematurely discharging a patient. So it has been held where a patient through an injury had become mentally unbalanced, which fact was known to the hospital authorities, but notwithstanding the known and helpless condition of the patient he was turned loose upon the streets unattended to make his way home through a large city with-

[23] In the matter of Baker, 29 How. Prac. Rep. (N. Y.) 485.
[24] In re Carlsen's Petition, 130 Fed. 379.

out his family having been notified, that his death by being struck by a trolley car was a result of the hospital improperly discharging him.[25]

However, if due care be exercised in determining whether or not the condition of a patient be such as to warrant his discharge, no blame would attach to those who were perhaps mistaken in their judgment. Thus in a North Carolina case,[26] suit was brought against the superintendent and three directors of the State Hospital for Insane for negligently discharging a patient who six months later killed the plaintiff's intestate. The court held that the defendants could not by the exercise of ordinary care have anticipated, foreseen, or expected that the homicide would follow as the natural result of their act in discharging the patient from the hospital; and that their erroneous or mistaken judgment or opinion that the patient was sane or insane, or that his being at large would not be injurious to him or dangerous to the community did not cause the death for which damages were sought. Of course if the patient had been confined in the hospital, he might not have killed the plaintiff's intestate; but it was equally true that

[25] Phillips v. St. Louis, etc., Ry. Co., 211 Mo. 419, 111 S. W. 109, 124 Am. St. Rep. 786.

[26] Bollinger v. Rader, 151 N. C. 383, 66 S. E. 314. Regarding the right of institutions to make regulations for the government thereof, and the right to expel intractable inmates, see *post*, p. 118 et seq.

if he had never been born, or had never become insane, he would not have committed the homicide. In other words, his absence from the hospital was a mere condition, but did not cause the injury. This case is easily distinguished from the one set forth in the preceding paragraph where the circumstances of the injury were held to be the natural result of the negligent discharge of the patient.

A very late case [27] upon this point is sufficiently interesting in its facts and the application of the law to be given in detail. The suit was brought against the hospital and the physician in charge of it to recover damages for the unlawful detention of the plaintiff and for assaults committed on her and neglect of her while in the hospital. The defence denied that any wrongful acts had been committed against her, but averred that she regularly entered herself as a patient and agreed to be governed by the rules and regulations of the hospital, that she was nervous and not capable mentally of caring for herself, and that what was done was in accordance with the rules and regulations of the institution, and denied that she was assaulted or neglected while under their care. But the jury found that the defendants wrongfully imprisoned the plaintiff and restrained her of her liberty, and also assaulted her as alleged in the

[27] Cook v. Highland Hospital, (N. C. 1915) 84 S. E. 352.

complaint. Compensatory damages were awarded. The Supreme Court of North Carolina upon appeal by the defendants found there was no error, and Mr. Chief Justice Clark gave his opinion as follows:

"The plaintiff was a young woman about to be married, who came to Asheville, N. C., from Savannah, Ga., to rid her system of malaria and for recreation and rest. She was somewhat delicate and nervous, but the evidence is that her mind was perfectly clear. Having heard of the Highland Hospital, operated by Dr. Carroll, as a sanitarium, she entered that institution after visiting it, but it was concealed from her that it was in effect a private asylum. The defendant Carroll gave her two pamphlets, one entitled 'Diets,' describing most delicious and appetizing foods. The other contained a description of sixty different 'Baths,' most elegant and luxurious, and offering most enticing inducements to patients. The pamphlets filed in the record are the *ne plus ultra* of all that is elegant and luxurious in bathing and diets.

"According to the evidence of the plaintiff and her sister, she entered the institution upon these representations and with no other thought than that she would be free to leave at will, could communicate freely with her family, and would receive the baths and diet mentioned in the pamphlets. She contracted for and received a front corner room,

and her married sister returned to the hotel. This was on Sunday, August 4, 1912. On the next day she was informed that she would not be permitted to see her married sister nor communicate with her, and was told that she must have her hair shampooed. She testified that her hair had been shampooed just before leaving home, and she was suffering from cold, sore throat, and earache, and that her physical condition just at that time forbade her being subjected to this treatment, and she protested against her hair being shampooed. The nurses gave this information to the defendant Carroll, but he gave imperative orders that the plaintiff's hair 'must be shampooed.' Her evidence is that, in obedience to this order, two or three nurses took the plaintiff forcibly from her bed, while lightly clad, raised her forcibly from the floor, when she fell upon it, carried her to the bathroom, and shampooed her hair against her will. The plaintiff then demanded to leave the hospital, and to see her sister, and announced that she would not remain. The defendant Carroll was informed of this. He thereupon gave orders that the plaintiff was not to see her sister or leave the hospital. According to the defendant's testimony, the plaintiff stated that she would jump out of the window before she would stay there without seeing her sister. The defendant Carroll thereupon directed that she should be moved into a protected room or padded cell lo-

cated in the rear, with diamond-shaped wire meshing on the inside, and iron bars on the outside, a locked door, and an electric light at the ceiling inclosed with wire and operated from the outside. This room had scant furniture and, according to the report of the nurses, was infected with roaches. Adjoining this locked cell were raving lunatics shrieking to be let out. On each of the days prior to this time, and after the plaintiff was taken to the barred and locked cell, the plaintiff's married sister paid visits to the hospital, but was kept in ignorance of the treatment given to the plaintiff, and was not permitted to see her. The plaintiff was kept immured in the cell, above described, adjoining raving insane people, while her married sister returned to Savannah carrying assurance from the defendant Carroll to the family that the plaintiff was progressing nicely.

"After five days the plaintiff was removed from the locked and barred cell to another back room, where she was restrained of her liberty against her will, and prevented from communicating with any member of her family for more than 3 weeks, making 32 days in all, until her mother, after receiving a pathetic letter written by the plaintiff, who had bribed a colored maid to secure a pencil and mail a letter, came to the sanitarium and demanded to see her daughter.

"The 'Highland Hospital' was incorporated, but

the defendant Robert S. Carroll was in sole and exclusive charge and, together with his wife, owned 99 shares out of the 100 shares of the capital stock. During the entire time the plaintiff was in the hospital, the defendant Carroll visited her only three times, according to the plaintiff's testimony, or five times according to the defendant's testimony. The plaintiff was paying $35 per week for board, and was charged $15 per week extra for half the time of a trained nurse, who was only a student, and who was being paid only $8 per month by the defendants. The plaintiff was subjected to compulsory hypodermic injections twice every day during her stay, against her protest. Her breasts were forcibly massaged each day in such a forcible manner that she groaned under the treatment.

"Instead of the luxurious diet described in the pamphlet, the food given the plaintiff was 3 ounces of milk and 1 ounce of lithia water 8 times a day at the beginning, which was increased to 6 ounces of milk, 1½ ounces of cream, and two raw crated eggs. She was read 'Why Worry' and 'Those Nerves' constantly during her stay. The defendant Carroll wrote only one letter to her family during the thirty-two days she was immured under his control. The plaintiff's arm was injured by the force used in dragging her to the bathroom to such an extent that she complained of it constantly during her stay in the hospital. She testifies that she

was such a physical wreck by reason of her treatment that she could not make her wedding clothes after her return home, and that she could not hold her baby after it was born. She graphically describes her agony of mind during her illegal restraint among lunatics, in a private asylum, in a distant State, far from home and friends, without means of communication with her family, without money and clothes with which to escape, being forcibly detained against her will and having entered the institution, according to her testimony, without knowledge of its nature, and being duped into supposing that it was a rest cure, with luxurious diet and baths. She testifies that she returned home a nervous wreck, requiring careful treatment for many months, and indelibly stamped with her experience as a prisoner in a madhouse.

"The defendants in their evidence deny the mistreatment, allege that the plaintiff was nervous and hysterical, but admit that she was restrained of her liberty; that she was placed in the 'protected' room; that her hair was shampooed though she earnestly resisted; and that she was restrained of her liberty and kept in the institution against her will, and that the family were not informed of that fact. The defendant Carroll testified that he restrained her and kept her in the institution against her will; that her lack of self-control had reached hysteria, which was that she was 'impul-

sive and would do unreasonable things.' He did not testify that she was insane, but said that hysteria is 'the borderland between sanity and insanity.'

"The judge properly told the jury:

" 'If the plaintiff was twenty-four years of age, unmarried, and was there in the hospital, and she subsequently applied to the authorities of the hospital for, and demanded, her release—demanded that she be allowed to go from the institution and be allowed and suffered to leave there—and after such demand made, if you find it, and that it was communicated by the nurses, or through the proper channels, to Dr. Carroll, and after that, that she, either by words, or by locking doors, or by anything that comes up to the definition of imprisonment, that I have given you was imprisoned, so that she was unable to carry out her desires and wishes in that regard, then if you find these facts—after that, the court charges you, as a matter of law, that she would be wrongfully imprisoned and restrained of her liberty.'

" 'If you were to find that she was in the institution, and that she was demanding to be released, which was properly communicated to the hospital authorities, but if you were to further find to your satisfaction that she was so nervous from any ailment or disease and so irrational that there was reasonable probability that, if so released at

the time, she would do herself some bodily harm, under such circumstances the hospital would have the right to detain her and restrain her, under the law of necessity and humanity, until that condition as to her reasonable apprehension of doing herself bodily harm had passed. And within that rule or limitation it would not be a wrongful and unlawful imprisonment.'

"'Now it is for you, gentlemen, to say, from the testimony, the facts you find, and how this matter is. Even though she went in under this paper, and if you find, as she contends, that she was perfectly rational, and knew what she was doing—what she wanted and didn't want—and she wanted to leave the institution, and expressed it to the hospital authorities, and the hospital authorities knew of that fact, and then after that restrained her of her liberty, then it would be in law, as I am holding, wrongful detention, unless they were justified in restraining her under those rules of humanity and regard for her welfare, as I have just given you.'

"There was a conflict of evidence as to the treatment that the plaintiff received, but there is no controversy that the plaintiff was detained in the defendant's hospital against her will; confined for 32 days; that she was confined a considerable part of the time in a locked and barred cell; that she was denied all communication with her friends and sub-

jected to having her hair shampooed and to massage of delicate portions of her body and to hypodermic injections daily against her will.

"The defendants contend that they had a right to do these things because the plaintiff signed an agreement upon her entrance that she would be subject to the rules and regulations of the institution, and that she could not be set at liberty without danger to herself. The judge submitted this latter phase to the jury, who found against it. Besides, the defendants did not account for the fact that, though the plaintiff's sister visited the institution, they gave her no information as to the plaintiff's condition and treatment, and that, during the whole 32 days that the plaintiff was restrained by them of her liberty and subjected to physical treatment against her protest, no information was given by the institution to her relatives, though this was practical, during the entire time, by wire or long distance phone.

"The judge properly told the jury that the plaintiff could not thus surrender control of herself to another by signing a paper at her entrance into the institution. [The court here cites authorities.]

"The main defense relied upon by the defendants is that, if they acted in good faith, there would be no liability upon their part. Whether or not this would be a defense to a recovery of punitive

damages we need not discuss, for the jury in their verdict denied the plaintiff, on the issue submitted for that purpose, any recovery of punitive damages. 'Good faith' is not a defense to the recovery of compensatory damages when the jury find that there was illegal restraint of liberty and compulsatory massage and hypodermic injections and other physical treatment upon a defenceless woman, who was in the absolute power of the defendants and kept immured under lock and key and with barred windows, without information given by them to her family of her condition, and she denied all communication with them. . . .

"The plaintiff was not committed as insane, and, if she had been, the defendants do not account for the fact that they accepted her as sane by signing the agreement with her upon her entrance into the institution. If she subsequently became insane, it was the duty of the institution to have at once notified her mother and sister. The testimony of the defendants, however, is that she was not insane. Evidently the defendant Carroll believed that he had absolute control of the plaintiff and the right to imprison her if she opposed his orders or will, and the right to impose on her whatever treatment he thought best, and that the family need not be consulted any more than the plaintiff herself. The effect of being at the head of such institution is very often—too often—to render the person in

charge callous and autocratic, and in his own opinion irresponsible to any one.

"In this land the law guarantees liberty to every one, subject to restraint only in the modes provided by the law, and even then there is the right to review the conduct of those in charge of those deprived of their liberty. The plaintiff was not committed to the care of the defendants by any legal proceedings adjudging her insane, and her signing the paper agreeing to the rules and regulations of the institution was not irrevocable. It did not subject her to the irresponsible power and control of the defendant. This is the whole controversy, and requires no further discussion.

"If the plaintiff did not abide by her agreement to obey the rules and regulations of the institution, the remedy of the defendants was to discharge her or, if her condition forbade this, to notify her relatives (neither of which they did) and not to imprison her and to force her to do their will. . . . The horrors of the imprisonment of a sane person in a private madhouse (and one is not the less such because it may be advertised as a 'sanitarium' have never been more graphically related or probably more truthfully than by Charles Reade in 'Hard Cash.' Like the novels of Charles Dickens, it has aided to correct evils which till then oppressed and afflicted society without hindrance from those who administered the law. . . ."

There has been considerable disputation over rights connected with the offices in State hospitals, and in many instances resort has been had to the courts in the settlement of these controversies. Let us examine some of these litigations. It will be observed that many of these cases turn upon statutory constructions, as most institutions of this character are governed by special legislation.

Proceeding *seriatim* we come to consider first the qualifications to such offices. In a certain Ohio case[28] the defendant, who was medical superintendent of an insane hospital, was charged with not being an elector of that State within the meaning of the constitutional provision that "No person shall be elected to any office in this State unless he possesses the qualifications of an elector." The court was of the opinion that the place was an office, that the person lawfully invested with it was an officer, and the defendant not possessing the qualifications of an elector as provided for by the constitution should be ousted from his position as medical superintendent.

Under a statute providing for State hospitals for the insane and the superintendents of such hospitals, the language of the statute as to the qualifications of such superintendents was as follows: "A medical superintendent, who shall be a well

[28] State v. Wilson, 29 Ohio St. 347.

educated physician, a graduate of an incorporated medical college, of good moral character, and who has not had less than three years' experience in the care and treatment of the insane." It was found that one of the claimants to the office was not qualified for the same because he had not had three years' experience in the care and treatment of the insane. The only evidence on this point consisted of the testimony of the person himself, which merely showed that for about a dozen years he had been a physician in general practice; that in the course of his practice he had been called upon to prescribe for a number of persons suffering from different kinds of mental disease, some of whom he said were insane; that he did not claim to be a specialist or expert in the treatment of mental diseases, and that he knew no reason why persons suffering under such diseases should come to him rather than to any other general practitioner. Upon cross-examination he said, "I have no institution for the treatment of the insane myself, and have never been connected with any institution for the care or treatment of the insane. I had parties under my care just the same as other patients. I would visit them whenever I was called to do so, or whenever I thought professional calls were necessary. I attended them the same as other persons suffering from other diseases. That is the extent of the care I have given those persons. I mean by 'hy-

gienic treatment' the application of remedies suitable to the trouble. I don't know that my practice has been different from that of other general practitioners.'' [29]

A person cannot qualify for an office if he already holds one that is inconsistent with the other. So where a member of the board of directors of a county infirmary was by said board appointed to the office of superintendent of the county infirmary and he still continued to hold the office of director, it was held that the duties of the two offices were incompatible; that they could not be legally held by the same person at the same time, and such appointment was therefore illegal and void.[30]

The grounds justifying the removal of an officer of a State institution were stated in a Nebraska case [31] wherein the court had to determine which of two persons was entitled to the office of superintendent of the hospital for the insane. A statute provided that "The Governor of the State shall appoint a superintendent and may appoint two assistant physicians for the hospital for the insane, one of whom shall be a woman, who shall hold their offices for a term of six years, unless sooner removed as hereinafter provided." It was further

[29] People ex rel. Moore v. King, 127 Cal. 570, 60 Pac. 35.

[30] State v. Taylor, 12 Ohio St. 130. Cf. Palmer v. Zeigler, 76 Ohio St. 210.

[31] State v. Hay, 45 Neb. 321, 63 N. W. 821.

provided that "The superintendent of said institution shall be a physician of acknowledged skill and ability in his profession, and a graduate of a regular medical college. He shall be the chief executive officer of the hospital and shall hold his office for the term of six years unless sooner removed by the Governor for malfeasance in office or other good and sufficient cause." Dr. H., who was eligible for the office, was appointed by the Governor and qualified therefor by giving the necessary bond and taking the required oath. He had been in office for about two years when the successor of the Governor who had appointed him to office caused a notice to be served upon Dr. H., to the effect that complaints in the nature of charges had been made to the Governor affecting the management of the hospital of which Dr. H., as superintendent, had control, and requiring Dr. H. to appear and to show cause, if any he had, why he should not be removed from the office of superintendent. Upon a hearing of the charges resulting in certain findings Dr. H. was, by order of the Governor, removed from office and Dr. A. appointed superintendent. The findings upon which the order of removal was based were held by the court to be sufficient in law to sustain such order, and Dr. A. had the right of possession to the office. They were contained in a letter written by the Governor to Dr. H. The findings and order follow:

"Sir: I beg hereby to inform you of the conclusions reached by me in the matter of the investigation of the management of the Nebraska Hospital for the Insane at Lincoln, during the period of your incumbency as superintendent. (1) From the investigations made by me I find that during the management of the hospital for the insane by you the expenses of maintaining the patients have been greater than necessary, and that there has not been that degree of economy exercised which the taxpayers of the State have the right to expect from those employed in the public service. (2) Also that the attendants employed by you and under your control have wantonly and unnecessarily abused and maltreated patients in your charge, and that the patients have not been given that kindly care and treatment from those having them in charge which by reason of their unfortunate condition they should receive. (3) Also that the medical treatment of patients, especially in the violent ward, known as the 'Third Ward,' has not been modern, nor in accordance with what experience has demonstrated to be best for patients in hospitals for the insane, in this: The administration of sedatives and narcotic drugs by yourself, your assistants, and attendants had a harmful effect upon the patients committed to your care. The administration of such drugs in the quantities given at the Nebraska Hospital for the Insane at Lin-

coln, Nebraska, under your superintendency, are not warranted by the experience of other institutions of the same character as this. The clinical records of the hospital over which you have had the supervision disclose that you have relied upon sedatives, narcotics, hypnotic drugs, to accomplish results which could better be obtained by the use of other and less dangerous methods. Especially do the records of your institution show the extensive employment by you and under your direction of the hypnotic paraldehyde, a drug dangerous to life when administered frequently and in large doses, and also you have carelessly and negligently permitted attendants at the hospital to administer such narcotic, hypnotic, and sedative drugs to patients under your charge, at frequent intervals and in large doses, at the discretion of the attendants, without the express prescription or direction of one of the physicians in charge of such hospital, and without specific direction so to do. That there has not been exercised that degree of care, caution, and skill in the management of the hospital which should obtain in such an institution, and which it is necessary to secure in order that the hospital may be conducted economically, and the patients receive the care and attention necessary for their bodily comfort and proper professional treatment looking toward their recovery. For the causes above mentioned it is hereby ordered that you be

and are hereby relieved of any further authority or duty as superintendent. Silas A. Holcomb, Governor."

While an official may be removed from his position for cause, he may not as a general rule be arbitrarily dismissed before the expiration of his term of office without notice and an opportunity to be heard upon the charges or complaint presented against him.[32] There should be a legal investigation, a trial, and an adjudication by the board or by persons who have the power of appointment and removal.[33] This matter is usually covered by statute, but where the law is silent as to the tenure of office and on the subject of removal, the power to remove is incidental to the power to appoint, and an official may no doubt be removed by those in whom such power is vested without the assignment of any specific cause if in their judgment it is for the best interests of the institution.[34] In cases of this sort, where the law is silent as to the mode of proceeding, reference must be had to the nature of the case to determine what course justice requires the amoving power to pursue in exercising its jurisdiction.[35] From the reported cases it ap-

[32] Welch v. Passaic Hospital Ass'n., 59 N. J. Law 142, 36 Atl. 702; Eastman v. Householder, 54 Kan. 63, 37 Pac. 989.

[33] Welch v. Passaic Hospital Ass'n., *supra*.

[34] State v. Archibald, 5 N. D. 359; People v. Higgins, 15 Ill. 110.

[35] People v. Higgins, 15 Ill. 110.

pears that if there is no statutory provision to the contrary, officials may be removed without notice or hearing. As was said in an Illinois case:[86] "When we consider the class of patients under his [the superintendent of the State insane hospital] charge, and their helpless condition, we might imagine the most aggravated cases of misconduct of the superintendent possibly falling under the immediate observation of the trustees, evincing an utter want of both moral and mental qualifications for the high and confidential trust reposed in him; and in such a case as that, have they not the power to remove him at once from the place he occupies? In such a case shall their hands be stayed till formal charges are presented, till a notice to appear and defend against those charges has been served, and a protracted trial had, for the purpose of proving, by the testimony of witnesses, facts which they already know by their own observations, and in the meantime the same abuses continue before their faces? Such a proceeding, instead of promoting the ends of justice and the objects of the law, would be but a mockery of the one and an abuse of the other."

Employment of a physician for a State hospital may be for a fixed term or temporarily. When a person has been appointed to the office of resi-

[86] People v. Higgins, 15 Ill. 110.

dent physician for several successive terms of a year each and is merely allowed to remain in the exercise of the duties of such office, and the question of reappointment is an open one, the failure to dismiss such person from office will not have the effect of an employment for another term for which salary can be recovered.[37]

A concluding word here might well be to caution officials and attendants against interesting themselves in a legal way in cases under their care. Most hospitals have occasion to treat casualty cases and third persons interested therein may seek the aid of the hospital officials and attendants in making legal disposition or settlement of the patient's claim. Even though payment of hospital charges may depend upon a settlement of such claim, an attitude of strict neutrality should be maintained.

[37] Taber v. Trustees of State Hospital for Insane, 138 Fed. 865.

CHAPTER IV

ADMINISTRATION AND REGULATION

You will recall that in the first chapter we gave preliminary consideration to certain principles of corporation law as relevant to our purposes here. It was there noted that most hospitals are incorporated, and it now becomes convenient under the prefix of this chapter to direct our attention immediately to the administration and regulation of incorporated hospitals.

Now all corporations are subject to the control of the legislature that created them in so far as such power is not curtailed by constitutional restrictions.[1] This power of control is not so absolute in the United States as in England, because all legislative acts in the United States are limited by the provisions of the State and Federal constitutions which cannot be violated. In England Parliament is not hampered by written constitutions, although in the United States the legislatures in the absence of constitutional inhibitions have the same unlimited power that resides in the British

[1] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

Parliament. The well-known constitutional prohibitions against depriving any person of property without due process of law and against the passing of laws impairing the obligations of contracts are examples of restrictions subject to which the power to control corporations is exercised by the legislatures in this country.

The internal affairs of civil corporations, within which class come non-charitable hospitals, are usually inspected and controlled under the visitorial power of the State government acting through the medium of the courts; that is to say, corporations are subject to control and regulation by the sovereign, and, if they abuse their powers conferred by the charter of incorporation, they are liable to have their affairs investigated by the government.[2] But in the case of eleemosynary or charitable corporations the power of visitation is usually in some private person or persons, such as trustees, governors, commissioners, or directors of the institution appointed by the founder of the charity, or in the event of the founder not appointing a visitor the law then appoints the founder and his heirs.[3] In the case of a strictly public cor-

[2] Cf. Kent's Comm., vol. II, pp. 300-305. Strictly speaking, the *visitorial power* concerns only eleemosynary institutions.

[3] Trustees of Union Baptist Ass'n. v. Huhn, 26 S. W. 766, holding that the person who endows a charity may assign his visitorial power, that incorporation of trustees under a charter which confers upon them the full power of management of the

poration, *i.e.*, an agency of the government, such as a State insane hospital, the State has exclusive control because matters for the public interest should quite properly have the oversight of the conservor of those advantages. Yet the mere fact that a hospital is subject to visitation and inspection by public officials does not make it a public institution.[4] A public official cannot hold two offices by which as the incumbent of one office he exercises the visitorial power over himself as the incumbent of the other.[5]

An illustration will illuminate the foregoing abstract statement. In an Illinois case [6] the question

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property of the institution, divests that right under the visitorial power of the founder, and vests it in the corporation.

"With regard to hospitals," said Blackstone, "it has long been held, that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by 14 Eliz., c. 5, which directs the bishop to visit such hospitals only where no visitor is appointed by the founders thereof: and all of the hospitals founded by virtue of the statute 39 Eliz., c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit."—1 Blackstone Comm. 482.

[4] Wisconsin Keely Institute Co. v. Milwaukee County, 70 N. W. 68. See also Chicago Washingtonian Home v. Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.

[5] State v. Taylor, 12 Ohio St. 130.

[6] People ex rel. v. Higgins, 15 Ill. 110.

as to where the visitorial power resided was raised when the trustees of the State Hospital for the Insane removed the superintendent of that institution from office. The act creating the corporation created the office of medical superintendent and provided that the trustees "shall have charge of the general interests of the institution; they shall appoint the superintendent," etc. The defendant contended that the power of removal could only be exercised by the legislature in their legislative capacity, or by the Governor, the members of the legislature and the members of the supreme court, as visitors of the institution. It was held that the right of removal was conferred upon and was designed to be exercised by the board of trustees.

Judge Caton announced the opinion of the court in these words: "We think it very clear that the power here conferred upon somebody could have had no reference to the power of amotion as inherently residing in the legislature; for with or without that law they possess the power, in their legislative capacity, to remove the superintendent for any cause whatever, or even without cause, and the limitation of the right to remove for the two specific causes only must have had reference to the power of amotion to be exercised by some other authority created by the act in which the limitation is expressed. The last section of the act declares that 'the Governor, the judges of the supreme

court and the members of the legislature shall be, *ex officio*, visitors of the institution.' Admitting that the term *visitors*, as here used, is designed to be understood in its technical sense, and it is manifest it was not designed to vest in the visitors all the powers incident to that office, when it is created by general terms or exists without restriction in eleemosynary institutions. The original and essential power of visitation is, by express provision of the statute, vested in the trustees; they are authorized to make by-laws, rules and regulations for the government of the institution, and its general interests are given them in charge; they are authorized to appoint its principal officers and to fix their salaries, and, in fine, are vested with the essential power of visitors. We cannot believe that the visitorial powers thus expressly vested in the board of trustees were intended also to be vested in another and distinct body of men under the general term visitors. It was the design of the legislator to confer upon the board of trustees the management of this institution, and to confer upon them all necessary powers for that management and control, as the most probable way of accomplishing, in the highest degree, the great and benevolent purposes of its creation; and we have no doubt it was the clear intention of the legislature that they should have the power of removing the superintendent as well as appointing

him, and otherwise properly managing the institution."

The visiting committee provided for by the statute of a State, with the right to visit the insane hospitals of the State at their discretion and with power to send for persons and papers, examine witnesses on oath, and do other things necessary to ascertain whether any of the inmates are improperly detained in the hospital or unjustly placed therein or are inhumanly treated, and having full power conferred upon it to correct any of the abuses found to exist in the insane hospitals, cannot, however, punish for contempt persons brought before it unless such power is expressly conferred upon it by statute.[7]

Notation has been made elsewhere of the fact that the right of persons to establish hospitals cannot be absolutely prohibited,[8] although such institutions may be subject to reasonable regulations. Thus the board of supervisors of a county or the legislative department of any city or town may provide by ordinance that patients in an insane

[7] Brown v. Davidson, 59 Iowa 461.

[8] See *post*, p. 131. The Louisiana case of Milne v. Davidson (5 Mart. N. S. 400, 16 Am. Dec. 189) is apparently *contra*. The erection of a private hospital was forbidden by an ordinance of the city of New Orleans within its limits, and it was held the city council possessed the authority to do so. The decision was based upon the peculiar sanitary conditions of the city, the court recognizing that the common law would hold such prohibition illegal.

hospital shall not be permitted to leave the grounds upon which it is erected unless accompanied by an attendant, and may impose a proper penalty upon the superintendent or keeper of such asylum for a failure to conform to such regulation.[9] A municipality under its police power may prescribe rules and regulations for the drainage of the hospital grounds, the purification and proper ventilation of the buildings, for the removal therefrom of any person afflicted with infectious and contagious disease, and for the general management and government of the hospital grounds, both internally and with relation to adjacent property.[10] But a municipality cannot make regulations that violate any law, and where a statute forbade the employment of females for more than a certain number of hours each day in any public institution, a regulation in regard to the employment of female nurses in a public hospital is limited by such statute.[11]

Statutes may of course be passed by the legislatures of the various States under the police power or jurisdiction over health matters regulating hospitals, and this is frequently done not only for the institutions of the State itself but for private hospitals as well. So it has been held that a statute

[9] Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727. Cf. *ante*, p. 16, *post*, p. 131 et seq.

[10] Bessonies v. Indianapolis, 71 Ind. 189.

[11] People v. Chicago, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954.

preventing, for the protection of the public health, the establishment or maintenance of additional hospitals in the built up portions of cities is valid and within the police power of the State.[12] Said the court in deciding this question: "That hospitals collect in one place a large number of diseased persons, that among them there are liable to be a greater or less number who are affected by contagious diseases, and that the number of persons affected by contagious diseases may be thus increased in a particular locality, cannot be denied. That the prohibition of hospitals, therefore, in crowded communities, has a real and substantial relation to the protection of the public health in general, must also be admitted."

It is proper for a legislature to provide that no hospital shall be constructed until its location shall be approved by certain officials of the city wherein such hospital is to be located.[13] The ordinance of a municipality which provides that the location and maintenance of private hospitals or sanitariums for the treatment of inebriates or persons suffering from insanity or other mental diseases must be consented to in writing by the owners of private property situated within two hundred feet of the hospital buildings and which in effect declares that

[12] Commonwealth ex rel. v. Charity Hospital, 198 Pa. St. 270, 47 Atl. 980.

[13] *Ibid.*

such an institution is a public nuisance and abatable as such unless consent thereto is secured, is a valid regulation. "This," said Chief Justice Rudkin of the Supreme Court of Washington, "in our opinion is a valid police regulation. The presence of a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities if located within two hundred feet of his place of abode. In other words, it is a matter of common knowledge that the presence of such an institution in a residential portion of a city would practically destroy the value of all property within its immediate vicinity for residence purposes. If so, it was proper and competent for the municipal authorities to require the assent of the injured parties to its location and maintenance." [14]

A hospital may and properly should have regulations for the administration of its affairs, and especially with regard to the government of the inmates in their conduct and behavior in the institution. Yet in the absence of both statute and by-law or other regulation the board of directors or trustees under its general supervisory power has an implied right to suspend, dismiss, or expel an

[14] Shepard v. Seattle, 59 Wash. 363, 109 Pac. 1067, 40 L. R. A. (N. S.) 647.

inmate who has been guilty of disorderly and disreputable conduct.[15]

The principle just stated was asserted in the case of the expulsion for insubordination of the inmate of a blind institution. A person named Tuck who was regularly admitted as an inmate of the Home for Adult Blind and remained there some months petitioned the court to reinstate himself, saying that during his sojourn at the home he led a sober and industrious life and obeyed all the by-laws enacted by the board of directors. He stated that to his knowledge no charge of misconduct of any kind was made against him prior to the introduction and adoption of the following resolution which deprived him of the benefit of the home: "Resolved, that Herbert Tuck be, and he is hereby, removed and expelled from the institution for insubordination and conduct prejudiced to the discipline, good order, and interest of the home." There was no statutory provision for the dismissal or expulsion of intractable inmates, and there was no by-law of the board of directors outlining the course to be pursued by the board in ridding the home of disreputable and intractable persons.

The court said that it would certainly be the more orderly and business-like way that there

[15] Tuck v. Directors of Industrial Home, 106 Cal. 216, 39 Pac. 607.

should be by-laws governing the course to be pursued by the board in such cases and also governing the conduct of the inmates, but notwithstanding the absence of such provisions the board in its supervisory capacity had power to expel Tuck. As to his claim that he was legally admitted to the home and had been dismissed without a hearing to which he was entitled, the court held that he had no such right or interest in the home such that he could not be deprived of its benefits without notice, and, the directors having the control of such matters, the exercise of their discretion was final and conclusive.

It was further argued that the board had no power to dismiss, except on proof of the violation of some statute or by-law pertaining to the government of the institution, but the court said, "We do not deem this contention sound. It appears that petitioner was expelled for insubordination, and that is a serious offence in such an institution. Rebellious conduct on the part of inmates, if not stamped out, is fatal to the successful life of the institution; and, even in the absence of statute or by-law covering the facts of the particular case, the board of directors are amply clothed with implied powers sufficient to deal with the offender." [16]

[16] Tuck v. Directors of Industrial Home, 106 Cal. 216, 39 Pac. 607.

Of course when a hospital does make regulations for its own administration, such regulations must be reasonable and consistent with the general purposes of the corporation. An Illinois case [17] involving the regulation of the conduct of the physicians who attended patients in a certain hospital furnishes an interesting illustration as to the power of a hospital to prescribe rules of conduct for those who practise their profession therein.

A duly licensed physician brought proceedings to require the directors of the hospital to permit him to practise as a physician in the hospital, which they refused to do. It appeared that a large majority of the regularly licensed physicians in the city and county of Champaign, wherein the hospital was located, regarded the physician as guilty of unprofessional and discreditable conduct in his practice and gave notice to the directors that they would not send patients to the hospital or treat them therein if this physician was admitted to practise there. Accordingly the board of directors adopted this by-law: "Section 1. The American Medical Association, the American Institute of Homeopathy, the Illinois Homeopathic Medical Association, and the State Eclectic Medical and Surgical Society, and the Illinois State Medical

[17] People ex rel. Replogle v. Julia F. Burnham Hospital, 71 Ill. App. 246.

Society, have adopted a code of medical ethics as nearly identical as possible and uniform in scope and arrangement. Only those physicians who comply with the code of the associations may practise in the hospital."

The physician it seems had done things to obtain patronage that were in flagrant disregard of the codes of ethics of the associations and societies of the profession, such as advertising publicly, using printed handbills, boasting of his skill and marvelous cures made, offering medical advice free, etc., and his conduct was regarded by the majority of the physicians and surgeons as unprofessional and discreditable, if not disreputable. The court held that the by-law was proper and enforceable, and that the physician was not entitled to the relief sought.

Some report must be made here of another case [18] relevant to the question of the reasonableness of institutional regulations in which the dispute was over a regulation prescribed for a State insane hospital by the State Commission of Lunacy. It was by statute incumbent upon superintendents of the poor, or town, county, or city authorities sending a patient to any asylum to see that before he was sent he was bodily clean and had comfortable cloth-

[18] People v. The Manhattan State Hospital, 5 App. Div. (N. Y.) 249.

ing in accordance with the regulations prescribed by the chairman of the State Commission of Lunacy. In the performance of his duty under this statute, the chairman prescribed certain regulations with regard to the kind of clothing to be furnished to each patient before entering a State hospital. Part of the regulation read as follows: "Considering the general danger always present of the introduction of contagious or infectious diseases into institutions where large numbers of people are congregated, and to avoid, so far as possible, the introduction of such diseases by means of wearing apparel, the clothing above provided for must, in all cases, be new."

An insane person who was sent to the institution was refused admittance by the superintendent because his clothing was not new, although he was bodily clean and wore respectable, clean, and comfortable clothes, and there was no apparent danger of his carrying contagious or infectious disease. He commenced proceedings to compel his admittance to the hospital, but the court held that the regulation was clearly upon a subject which was committed to the authority and discretion of the chairman of the State Commission of Lunacy and it was for him to say not only that the man should be comfortably clothed, but, within certain limits, of what that clothing was to be composed, and any regulations that he made upon that subject were to

be obeyed by the officers of the different State hospitals. The fact that it cost $18 to $20 per person was decided not to be extravagant expenditure, because the chairman had the right to make such regulations as would make it certain that no infectious disease would be carried.

CHAPTER V

FOUNDATION AND ORGANIZATION

Hospitals are the instruments of science, and in the present astounding number of such establishments we have evidence of the seemingly incredible advance of scientific principles. In them we have likewise a tribute to the growing benevolence of society, although beyond doubt in the beginning hospitals were founded, not because of any refined sense of morality, but rather from practical considerations. The early hospitals for the isolation and treatment of lepers were not built out of pity for the afflicted creatures, but because of the fear with which that disease was regarded by clean persons.

Sir Thomas More, writing in the sixteenth century in the description of his ideal commonwealth or model society, *Utopia,* says, "But first and chiefly of all, respect is had to the sick, that be cured in hospitals. For in the circuit of the city, a little without the walls, they have four hospitals, so big, so wide, so ample, and so large, that they may seem four little towns, which were devised of that bigness partly to the intent the sick, be

they never so many in number, should not lie too throng or strait, and therefore uneasily and incommodiously: and partly that they which were taken and holden with contagious diseases, such as be wont by infection to creep from one to another, might be laid apart far from the company of the residue. These hospitals be so well appointed, and with all things necessary to health so furnished, and moreover so diligent attendance through continual presence of cunning physicians is given, that though no man be sent thither against his will, yet notwithstanding there is no sick person in all the city, that had not rather lie there than at home in his own house." The hospital provisions of our great cities show that at least in this respect More's suggestions for the society of the future have been substantially carried out.

You will recall that in the opening chapter reference was had by way of introduction to certain principles of corporation law as relevant to our purposes here. Turn we now for a moment to their consideration. As was then stated, though many hospitals are incorporated, it is by no means necessary that a hospital be organized as a corporation.[1] In 1740 the Lord Chancellor of England

[1] *The American and English Encyclopædia of Law* (vol. 15, p. 760), noting the fact that a public hospital is almost invariably incorporated, says: "There are some cases which seemingly form exceptions to the general rule. Certain municipal hospitals are

said, "The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be."[2] But for the reasons already set forth and those that will appear now, it is the best and most practical form of organization to adopt. The steps are simple, usually consisting of a compliance with certain formalities prescribed by the statutes of the various States. The requirements may differ somewhat among the States, and the procedure may show slight variations according to whether the institution is to be of a charitable nature or for the private profit of the organizers, but in either case it is neither an elaborate nor an expensive ritual to be gone through with.[3] The legal resultant offers an ample reward for the employment of this method of organization.

Perhaps a brief contrast with another and com-

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without charters, but are formed and maintained under the general delegated authority given by the state to municipalities. There seem, also, to be instances where municipal corporations, by authority of their charters, have organized permanent and general public hospitals and asylums, but have omitted securing for them any especial charters. Such an institution is not, of itself, an incorporated body, but is apparently a distinct department or branch of the municipal organization, for which the municipality is responsible."

[2] Attorney-General v. Pearce, 2 Atk. (Eng.) 87, 88.

[3] The statute of 39 Elizabeth, chapter 5, incorporated all hospitals founded by charitable persons without further trouble.—1 Blackstone Comm. 474.

mon form of association will show the advantages of the one suggested. We are speaking now of the establishment of the health institutions for the private benefit of its promoters, because, as has been indicated, an institution dedicated to charitable uses must almost of necessity put on the corporate cloak in order to insure its continued existence. We have already noted the fact that a corporation will live, enjoying its rights and privileges, regardless of whether or not there are changes in its membership by reason of death or from other causes; that is to say, corporate life is artificial and perpetual, not human and limited.

This is not true of other associations uniting individuals and recognized by law. Thus a partnership is dissolved by the death of one of the members. There can be no transfer of interest in a partnership by one of the partners without working a dissolution, but it is well-known that the transfer of his interest by a member of a corporation does not dissolve the corporation. In a partnership each individual is personally liable for the partnership debts, while the liability of the members of a corporation is limited to their investments. One partner can bind his associates by acts done within the scope of the partnership business, as they are agents for each other, and under such circumstances the partners may be mutually liable for the negligence or malpractice of one member of

the firm.[4] In the case of a corporation the management of the business is in the hands of a board of trustees or directors, who appoint officers or agents to transact the business, and the individual members have no power or authority in carrying on its affairs. The partnership relation is one of trust and confidence. The personal equation is so prominent and the power of each member is so broad that the relationship is open to serious abuses. Naturally persons hesitate to invest money in an enterprise conducted under this form of organization; the partners themselves may well hesitate to accept investments from strangers or persons whom they would not care to have associated with them. On the other hand, the partnership features of unlimited liability and mutual agency are not present in the corporation, and investments from any one may be quite safely received.

In view of these considerations it becomes natural to ask the reason for combining as partners or becoming incorporated when it is possible to carry on a business for profit without doing either. The answer is that individuals not intending a partnership may, nevertheless, in contemplation of law, become partners by their acts. Thus the sharing of the profits of an enterprise, though not

[4] For discussion of partnership liability of physicians, see *The Doctor In Court*, pp. 56-57.

absolutely conclusive as to the existence of a partnership, is one of the essential elements thereof, and affords strong evidence that such is the relation existing between the associates. So if a private hospital is established by several physicians who share the profits of the venture, partnership liabilities would be likely to attach, and to avoid the dangers of that relation the safest thing to do is to become incorporated at the outset. It has been held that where a physician operated a private hospital for his own benefit in connection with his practice and it does not appear that the institution was incorporated, the physician is personally liable for the negligence of nurses employed by him.[5] Prior to the passage of a statute enacted in the reign of Queen Elizabeth[6] hospitals could be founded only by royal license, but by that act they might be incorporated. It enabled "all and every person and persons" to found hospitals for the poor, and, it was held, a municipal corporation was included and could exercise the powers given by the act.[7]

The term *foundation* has apparently two senses in which it may be taken. The incorporation is called the foundation as is also the first gift of

[5] Fawcett v. Ryder, 23 N. Dak. 20, 135 N. W. 800.

[6] 39 Eliz., c. 5.

[7] Mayor, etc., of Newcastle-upon-Tyne v. Attorney-General and Hospital, 12 Clark and Fin. (Eng.) 402.

revenues.[8] He who endows it or furnishes the first donation is considered the founder by law.[9]

A hospital has been held to be *established* where a municipality having power to establish such an institution purchased a farm with the buildings thereon expressly for hospital purposes.[10]

The right of private persons to establish hospitals cannot be absolutely prohibited, though such institutions may quite properly be subject to regulations of a reasonable character, just as the regulation of medical practice is permissible.[11] But this right to found hospitals does not carry with it the power to maintain them in such manner that they constitute nuisances. In other words, the very power of regulation is full legal recognition of the right to maintain them unless and until they become nuisances in fact.[12]

The right to establish and maintain a private asylum for the treatment and care of persons suffering with mild forms of insanity and other nervous and mental diseases was presented to the court of California for determination in a habeas corpus proceeding.[13] The facts of the case were

[8] The Case of Sutton's Hospital, 10 Coke (Eng.) 1.

[9] *Ibid.*

[10] Richmond v. Henrico County, 83 Va. 204.

[11] For discussion of the law relating to the qualifications of physicians and surgeons, see *The Doctor In Court*, ch. vii.

[12] Hospitals as nuisances, see *ante*, p. 65 et seq.

[13] Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. R. 152, 19 L. R. A. 727.

briefly these. The petitioner was imprisoned upon a charge of maintaining within a certain county a hospital for the treatment, for reward, of insane persons. An ordinance of the board of supervisors of the county regulating the business of keeping asylums for the care of persons afflicted with insanity, inebriety, and other nervous diseases, provided, among other things, that the board should not grant a license to any person to conduct such business unless the walls of the asylum were fireproof by being constructed of brick or iron, or stone and iron, and the grounds accessible to the patients were surrounded by a brick wall of certain specifications, and the premises situated at least four hundred yards distant from any dwelling or school-house. It was further provided that no license issued by the Board should authorize the treatment of male and female patients in the same building.

The petitioner alleged that he was a physician and surgeon, and that he especially devoted his attention to that particular branch of the profession that deals with the treatment of insane persons and patients with nervous and mental disorders. He admitted treating any mild form of insanity, such as melancholia, dementia, and hysteria, but did not knowingly receive or treat violent or dangerous cases.

The court held that the business was a lawful

one and could not be prohibited by oppressive and unreasonable regulations. The provisions set forth were held to be unconstitutional and void because they constituted an arbitrary exercise of the police power. The petitioner was discharged.

Judge De Haven said in his opinion, "The State may, of course, make proper laws for the care, government, and safe-keeping of the unfortunate insane within its limits. This duty it owes, not only to those who are thus rendered incapable of taking care of themselves, but also to the community at large, the members of which are entitled to protection from the acts of persons not subject to the command of reason. In the discharge of this duty the State has provided public asylums, to which persons who are so far disordered in mind as to be dangerous to remain at large may, upon satisfactory proof of such condition of mind, be committed . . . , but it has made no provision at all for those of unsound mind who are not regarded as dangerous to themselves or the property of persons or others; and, even as to those who are insane to such degree that they may under the law be committed to the state asylum, the statute provides that 'the kindred or friends of an inmate of the asylum may receive such inmate therefrom on their giving satisfactory evidence to the judge of the court issuing the commitment that they, or any of them, are capable

and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person.' . . . It will thus be seen that it was not the intention of the legislature, in providing public asylums for the insane, to deprive the kindred and friends of even dangerous lunatics of the privilege of caring for them elsewhere, upon showing their ability and willingness to do so, while, as to those not regarded as dangerous to themselves or others, the law does not contemplate that they shall be confined in such asylums at all. But unfortunate persons belonging to this latter class are not to be denied the right to receive the patient attention and often healing treatment of a comfortable private asylum or hospital, if they or their kindred or friends are able and willing to incur the expense of such care and treatment. The business, therefore, of conducting a private asylum, in which proper care can be given to such persons by a member or members of the medical profession having experience and special skill in the treatment of such cases, is a necessary and humane one; and the right to maintain such an asylum or hospital, and to follow and practise this particular branch of the medical profession, cannot be prohibited or burdened with oppressive and unreasonable conditions."

The court added, "Of course, in the manage-

ment of a hospital where insane persons are treated, it is necessary to have, and it must be presumed that there will be, a sufficient number of competent attendants to prevent danger or damage from unreasonable actions of such insane persons. Without such attendants no such asylum or hospital could be properly conducted."

The question of the right of a medical school to establish and maintain a hospital was raised a few years ago by a bequest to Tulane University of a fund to be used by its board of administrators under the supervision of the university's medical faculty for the establishment of a clinic and hospital. It was contended by relatives of the deceased that it was beyond the powers of the university to do this, but the Louisiana court did not take this view of the matter, holding that a hospital is indispensable to a medical school, and that it could not be said that the authority to establish and maintain a medical school did not include authority to establish and maintain a hospital.[14]

"On the subject of the connection between a medical school and a sick hospital," said the court, "Dr. Rudolph Matas, the distinguished professor of surgery of Tulane University, testifies as follows:

" 'From the very beginning of the systematic teaching of medicine all over the world it has been

[14] Hutchinson's Succession, 112 La. 656, 36 So. 639.

found necessary—absolutely necessary—that acquaintance of students should be made with disease at the bedside. From the days of Hippocrates it has become evident that medicine should be studied by the student only at the bedside of the patient himself. Realizing these conditions, the founders of this university, as well as other medical schools, have always endeavored to utilize clinical material for the instruction of their students. This is simply the application of a principle in the teaching of medicine which has come to us from remote antiquity down to the present time, and has been extended, developed, and perfected in accordance with the means and resources of every institution. No medical college can really exist as such without patients as a basis of instruction, without clinical material, as we call it, 'clinical' meaning the study of disease at the bedside. Clinical instruction is part of the training in every medical school. The necessity for such a mode of instruction is so plain as to be almost axiomatic, and needs no demonstration. The more clinical material, the better the school. Just as an illustration of the importance attached by medical men to the hospital as a necessary adjunct to the medical school, I will quote the first line of a recent article on medical education by Professor John Osler, of Johns Hopkins University, which appeared in the *Medical News* of January 10th, in which he adopts the following quotation from

Abernethy as his motto: "The hospital is the only proper college in which to rear a true disciple of Æsculapius." The basis of success of every medical college is the association of a hospital with a medical college. One is indispensable to the other.' "

"If, then," the court continues, "a hospital is indispensable to a medical school, can any one in reason say that the authority to establish and maintain a medical school does not include authority to establish and maintain a hospital? A hospital established for such purposes is an educational institution. . . . Any institution organized by law to teach medicine has, as a necessary incident thereto, the right to set up and maintain a hospital to afford its students opportunity for the study of disease at the bedside of the patient. A medical school has as much power and authority to have a library of living disease as a literary school has the right to have a library of books. It requires no special act of legislative authority to build a house, set up beds in it, and invite sick people to come there and be treated. It requires no special authority to buy books and place them on the shelves to be read. . . . But a hospital for the sick is shown to be not only closely allied to a medical school, but absolutely indispensable to it." [15]

Despite the marvelous achievement of modern

[15] For liability of hospital maintained in connection with a medical school, see *ante*, pp. 38-39.

science we are still liable to visitations from various epidemical diseases. The fear of men in this respect is reflected in the provisions of their laws; it is seen crystallized in the codes of all times. Present health administration is a consequence of past calamities of this description. England's Public Health Department can attribute its greatest growth to the unpleasant cholera manifestation of the middle nineteenth century. The havoc wrought by pestilence has always been a matter of deep concern to government. At such times people instinctively turn to it for aid. The government must step in and provide the means for checking the spread of the disease. The public safety demands quick action. Hospitals are usually necessary. This duty of suppression generally falls upon the local authority—the town or city acting through its health agents. Yet the power of these governmental agencies to establish hospitals or to do those things necessarily incident thereto has been frequently challenged.

Authority to establish hospitals is usually granted to municipalities in express terms, or it may be implied from the specifically conferred power to act in matters affecting the public health. Thus the power to purchase sites or to acquire in other manner locations for hospitals may be implied from the power to build detention hospitals,[16]

[16] Yegen v. Yellowstone Co., 34 Mont. 79.

and a municipal corporation has the power to rent a building for persons infected with smallpox under the authority "to remove or confine persons having infectious or pestilential diseases."[17] But a board of health or city has no power to take a person's house and turn it into a hospital without the consent of the owner.[18] However, if a house is rented for a hospital it would make no difference that it was not actually used, the municipality would still be liable for the rent.[19] Where a board of health was by ordinance given "general supervision" over the health of the city with power to do all things necessary to make the ordinance effective, it was held that this conferred upon the board of health the power to rent a building for hospital purposes, the city then fearing a cholera visitation.[20]

Mention has been made hitherto of the method of sanitary administration in England. It was then noted that under the Public Health Acts sanitary districts have been mapped out covering all the

[17] Anderson v. O'Connor, 98 Ind. 168. While a board of health may remove persons infected with smallpox if their continuance in the city is incompatible with the safety of the people of the city, yet the act, though lawful, may be done in such a manner as to inflict injury upon an infected person and liability for negligence may attach. Aaron v. Broiles, 64 Tex. 316.

[18] Lynde v. Rockland, 66 Me. 309; Hersey v. Chapin, 162 Mass. 176.

[19] Aull v. Lexington, 18 Mo. 401.

[20] *Ibid.*

territory of England and Wales under control of local authorities—rural and urban district councils —subject to guidance and supervision by the central authority vested in the Local Government Board. We have now reached a position to take up the establishment of hospitals in these jurisdictions under the Public Health Acts.

The district council may establish hospitals for the reception and care of the sick within its jurisdiction, but this power gives no authority to exercise it in such manner as to create a nuisance. The statutory powers conferred permit the local authority various means of providing for the sick; thus it may build its own hospitals, or make any agreement or contract with a hospital already in existence, or may in conjunction with any other local authority make common hospital provisions for the combined districts.

The Isolation Hospital Acts of 1893 and 1901 empower a county council to establish hospitals for persons suffering with infectious diseases. Intervention is had by formal application by a local authority or upon report by the county medical officer that hospital provision is needed but has not been made. A hospital district may be then established and a committee organized for its administration with power to erect a hospital and do those things incidental to the successful management thereof.[21]

[21] Halsbury's *Laws of England*, vol. 23, p. 361 et seq.

The United States Public Health Service [22] has established more than a score of marine hospitals and upward of a hundred relief stations where medical and surgical treatment may be had by governmental employés and the men of the merchant marine, but with the decentralization of health powers and their habitancy in the several States, the establishment of hospitals is almost exclusively under the supervision of local governments and any regulation of private hospitals is a matter over which a State or its agents has jurisdiction.

[22] See *ante*, pp. 17-18.

CHAPTER VI

REMUNERATION AND SUPPORT

Heretofore we have considered the effect upon a charitable institution of its receiving remuneration from inmates or patients. The question is important because a hospital of a charitable nature enjoys a certain freedom from liability that is not had by institutions run for profit. The conclusion there drawn from the opinions of the courts was that the mere fact of a hospital's receiving pay from its patients did not furnish a test of the charitable character of the institution, as it might receive remuneration from those able to pay and still retain its charitable nature with all the privileges accorded such establishments by law. We shall not now have to go over this matter that was more conveniently referred to elsewhere, but we may proceed to other things important to our purposes in this chapter.

The matter of remuneration involves general principles of contract law and each case depends to a very great extent upon its own peculiar circumstances. It is not necessary that formal words be used to bind a person to pay for hospital ser-

vices, but a contract may be implied from his acts or silence with knowledge of the custom of such institutions to charge its patients. The mere fact that a hospital is charitable and treats many persons without reward would probably furnish no excuse for non-payment to one who receives treatment and care therein and who is able to pay for the benefits he receives, unless it is the custom of the place to treat all persons without charge. But aside from this class of cases involving the liability of the patient himself there is another line of decisions of equal importance relating to the responsibility of third persons.

It is well known that a husband is generally responsible for the necessary medical services rendered to his wife, and a person is usually bound to furnish medical care and treatment to his minor children, although a minor is personally responsible for the necessaries of life that have been supplied to him, which includes medical attendance.[1] In the above cases it is conceivable that the circumstances might involve hospital charges, in which event the third parties mentioned would be in all probability responsible.

Employers of labor are not ordinarily bound to pay a hospital for the expenses of the care and treatment of their injured employés, although the

[1] See *The Doctor In Court*, pp. 25-26, 91.

so-called workmen's compensation acts now in force in so many States generally make it obligatory for the employer to pay at least a part of the hospital or medical expenses of those employés who are injured in the course of their employment.[2]

However, apart from such local industrial legislation an employer may place himself in such relation to a hospital as to make himself answerable for the hospital expenses of an employé. The most important question in this category of cases has been in regard to the right of an employer or other third person to terminate his responsibility after it has been once assumed. In other words, can an employer or other person cause one who needs hospital services to be sent to such institution and then by merely giving notice to the hospital that he will be no longer responsible for the expenses of the patient terminate his own liability therefor? The consideration of certain selected cases will show the attitude of the courts toward this question and illustrate the principle upon which their decisions have been predicated.

The case of St. Barnabas Hospital v. International Electric Company[3] was an action to recover for the care and treatment of an employé of the defendant company named Soutar, who was severely injured while in the employment of the

[2] Cf. The Massachusetts Workmen's Compensation Act.
[3] 68 Minn. 254, 70 N. W. 1126, 40 L. R. A. 388.

defendant and was brought to the plaintiff hospital by the defendant. Soutar was kept at the hospital from October 22d until April 8th. On November 12th the defendant gave notice that it would not be responsible for the care and treatment of Soutar after the next day. The defendant contended that it could terminate *instanter* its promise to pay, while the plaintiff contended that the defendant having brought a seriously injured man to the hospital, and the plaintiff having taken him in and accepted him as a patient at the request of the defendant and on the faith of its promise to pay, it would remain liable notwithstanding notice to the contrary, until it removed him, or until he sufficiently recovered so that he could be dismissed or put out of the hospital without great danger to his health or life, unless it appeared that he had means of his own to pay out of which the plaintiff could have collected its pay. The case was submitted to the jury under the theory of the law thus advanced by the plaintiff, and the verdict of the lower court for the plaintiff was affirmed.

Said the court, "The plaintiff having taken in a helpless and severely injured man at the defendant's request, and upon its promise to pay for an indefinite time, it would be monstrous if the defendant could, the very next day, summarily withdraw its promise, leave the sick man on the plaintiff's hands, and put it to the alternative of either

keeping and caring for him without pay, or else cruelly and inhumanly throwing him into the street."

With regard to the statement of the lower court as to the implied conditions upon which the contract could be terminated—removal, recovery, or remuneration by the patient himself—the higher court said, "It is in accord alike with common sense and the dictates of humanity. . . . There was no evidence that Soutar had any means to pay for his own treatment. All that it shows is that he was a single man, and presumably had no home of his own. The charge of the court implies that the burden was on the plaintiff, if it would relieve itself of liability on that ground, to show that Soutar had means to pay for what care he received. We are of the opinion that this was right. Plaintiff's contract was with defendant, and not with Soutar. Defendant having brought the patient to the hospital and promised to pay for his treatment, if it would relieve itself of liability after notice, notwithstanding its failure to remove him, and the further fact that he was in no condition to be dismissed, it was at least incumbent on it to show that the plaintiff could and should have collected it from Soutar himself."

Another case [4] based upon the foregoing one and

[4] Omaha General Hospital v. Strehlow, 96 Neb. 308, 147 N. W. 846.

consequently in the same category with it, but involving the further question of the right of an agent to bind his principal for services rendered to one who has been injured while in the principal's employment, is sufficiently interesting in its facts to be given in some detail.

The hospital was a corporation with the main motive of carrying on a general hospital for pay. It sued a building contractor for surgical and hospital treatment given to one Anderson who fell from a trestle and was seriously injured while working for the defendant. Anderson was taken to the hospital by the regular physician of the defendant, and he died after remaining there twenty-nine weeks. The defendant denied that Anderson was kept at the hospital during that time at his request, and stated that he had given notice to the effect that they would not pay. The testimony of the defendant Strehlow was in part as follows:

"Q. What did you do after you were called over there?

"A. I called at once to my doctor and told him to come at once, a man was hurt there.

"Q. Who was your doctor?

"A. Dr. Ward. . . .

"Q. What did you state to Dr. Ward?

"A. I just simply told him through the phone to come and take care of the injured man.

"Q. He came, did he?

"A. Yes, he came at once.

"Q. Dr. Ward was your regular physician?

"A. Yes, sir.

"Q. Was this man Anderson able to get about at the time?

"A. No; while I called for the doctor somebody called for the ambulance, and they took care of him in the ambulance."

The manager of the plaintiff hospital, Mr. Robel, testified that Anderson was brought to the hospital on March 25th, and remained there until October 14th.

"Q. Who brought him to the hospital?

"A. Dr. Ward.

"Q. Dr. Ward to which Mr. Strehlow has testified?

"A. Yes, now deceased.

"Q. Will you state the fact as to whether you had any conversation with Dr. Ward as to who was to pay for this man's treatment in the hospital?

"A. I did have such conversation.

"Q. Will you kindly state to the court—state the conversation or the substance thereof as you may remember it?

"A. Dr. Ward informed me that Mr. Strehlow would be responsible for the payment of the hospital bill of Mr. Anderson; that he was employed

by Mr. Strehlow to look after his men and had been ordered by him to take Mr. Anderson to the hospital.

"Q. Then if I understand you correctly, Dr. Ward informed you that Mr. Strehlow would pay for the services that the hospital rendered?

"A. Yes, sir."

This same witness testified as to his conversation with the defendant regarding the services rendered Anderson in the following manner:

"Q. Will you state that conversation as you remember it?

"A. Mr. Strehlow stated to me that he wished to state that he wouldn't be responsible for the payment of the John F. Anderson account 'from now on.' My reply was that we had been holding him responsible for the payment of it and would continue to do so. To which he replied, 'You fight it out with the insurance company.' My reply to that was that we had no fight with the insurance company; the hospital didn't pay the premium for the protection of his men; if there was any fight in connection with the case, of course it must be with him.

"Q. That was all, was it, of the conversation?

"A. That was all."

In commenting upon the facts as thus disclosed by the record, the court said, "The evidence clearly establishes the fact that from the time Anderson was taken to the hospital until the moment of his death there never was a time when he could have been safely removed therefrom. The injury proved to be a very serious one. A number of necessary operations were performed; but, in spite of all the well-known skill of Dr. Ward, Anderson died. There is no evidence that defendant at any time subsequent to his interview with Mr. Robel offered to remove Anderson from the hospital, nor was any evidence offered by the defendant to show that Anderson was possessed of any property or funds from which plaintiff could have recovered pay for its services. It is contended by defendant that Dr. Ward had no authority to bind defendant for the payment of Anderson's hospital charges. We think this contention is unsound. According to defendant's own testimony, he placed no limitation upon his instructions to Dr. Ward, who was his regular doctor. He called him and 'told him to come at once; a man was hurt.' When asked what he stated to Dr. Ward, he testified: 'I just simply told him through the phone to come and take care of the injured man.' He showed that, while he was telephoning, somebody—evidently some of his other employés—called for the ambulance. He knew, therefore, that the man was badly

injured, and that an ambulance was necessary to convey him somewhere for treatment. While no witness so testified, it was a fair inference that Anderson was a single man. He could not in his then condition be taken to his room, and hence the defendant could not help but know that he would have to be taken to a hospital. He did not direct Dr. Ward to simply administer first aid or to give him emergency treatment, but he told him 'to come and take care of the injured man.' He did the proper and humane thing, just what any employer ought to do where an employé is lying helpless as a result of an injury received in his employment. He knew, as well as he knew anything, that Dr. Ward would at once take Anderson to a hospital, and, if he wanted to place any limitation upon the doctor's authority to bind him for services rendered by the hospital, then was the time for him to impose such limitation. It is clear, therefore, that Dr. Ward was fully authorized by defendant to take Anderson to a hospital.

"After he was taken to plaintiff's hospital, the defendant said nothing to the hospital authorities for five days, and not then until, as he himself testifies, he was called by the manager, when for the first time he told them that he would not be responsible for the payment of the Anderson account 'from now on.' By this statement he recognized the right of Dr. Ward to take Anderson to the

hospital, and ratified the act. The only question, therefore, for our determination is: Could he, after having unloaded his helpless employé upon the plaintiff, relieve himself from further liability by his own *ipse dixit*, or was it his duty, after taking Anderson to the hospital, to pay for the hospital charges up to that time and remove him to some other place?"

The court approved of and followed the holding in the St. Barnabas Hospital case to the effect that the defendant could not by merely giving notice terminate his liability for the hospital services rendered by the plaintiff. It is to be noted that cases may arise in which the question of agency might be decided the other way, in which event by notifying the proper poor authorities and the hospital an employer might terminate his liability.[5]

Questions relating to the collection of hospital charges sometimes arise between State institutions and towns or counties who are charged by law with the maintenance of their indigent sick and other unfortunate persons. Such matters are generally provided for by the various States' legislatures and they form a body of enactments of a purely local nature that cannot be gone into here; and the

[5] Cf. Salter v. Nebraska Telephone Co., 79 Neb. 373; distinguished in Omaha General Hospital v. Strehlow, 96 Neb. 308, 147 N. W. 846.

adjudicated cases on such statutes are not of universal interest.[6]

Power is generally given to State hospitals to recover expenses from patients or inmates who have the means to pay. It has been held that pension money collected on behalf of a lunatic may be taken in an action for the lunatic's board under a statute giving to the board of commissioners power to sue in the name of the asylum to recover a patient's board from his estate.[7] In England a local authority that incurred expenses in maintaining a non-pauper patient in a hospital may recover such debt from him at any time within six months after his discharge, or, if he dies in the hospital, the local authority may collect from his estate.[8]

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[6] Cf. State of Wisconsin v. Dodge County, 56 Wis. 79, 13 N. W. 680.

[7] Western Kentucky Asylum v. White, 104 Ky. 751.

[8] Halsbury's *Laws of England*, vol. 23, p. 434.

CHAPTER VII

MILITARY AND NAVAL HOSPITALS

Emerson likened war to an epidemic of insanity, breaking out like the cholera or influenza, and infecting men's brains instead of their bowels. In at least one respect war is like an epidemic: it calls hospitals into being. Because of the peculiar status of military and naval hospitals, a place has been delimited here for a consideration of the laws and customs of war applying to this class of hospitals.

The obligations of belligerents toward the sick and wounded are vastly different in present-day warfare from those observed in former times. In this respect much ground has been covered in a general advance. According to one writer[1] on international law we hear little of the wounded in ancient times because those left upon the field of battle were plundered and killed, and it was not until the time of the Crusades that special provision was made for them by the founding of the order of Teutonic Knights. State provision for the wounded of the armies seems first to have been made in the seventeenth century when a few field

[1] Lawrence's *Principles of International Law* (4th ed.).

hospitals and some surgeons were attached to military forces. But even with the steady advance made in ameliorating the condition of the sick and wounded, in contests with uncivilized or semi-civilized peoples the wounded now frequently undergo great suffering. Napoleon poisoned his own sick and wounded at Jaffa in his retreat from Syria to prevent them from falling into the hands of the Turks and being tortured and massacred.[2]

The Geneva Conventions of 1864 and 1868 regarding the condition of the sick and wounded greatly elevated the standard of conduct in land belligerency. Ambulances, military hospitals, and the persons connected therewith were neutralized. The convention signed at Geneva July 6, 1906, improving and supplementing the prior conventions now furnishes the criterion of conduct, and the signatory powers at The Hague in 1907 recognized it and bound themselves to its observance.

This convention of 1906 contains eight chapters, the first six of which here follow. The two chapters omitted contain provisions regarding the execution and ratification of the convention.

CHAPTER I

The sick and wounded

Article 1. Officers, soldiers, and other persons officially attached to armies, who are sick or wounded,

[2] Lawrence's *Principles of International Law* (3rd ed.), p. 338.

shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.

A belligerent, however, when compelled to leave his wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and materiel of his sanitary service to assist in caring for them.

Art. 2. Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners become applicable to them.

The belligerents remain free, however, to mutually agree upon such clauses, by way of exception or favor, in relation to the wounded or sick as they may deem proper. They shall especially have authority to agree:

1. To mutually return the sick and wounded left on the field of battle after an engagement.

2. To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported, and whom they do not desire to retain as prisoners.

3. To send the sick and wounded of the enemy to a neutral state, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities.

Art. 3. After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from robbery and ill treatment.

He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration.

Art. 4. As soon as possible each belligerent shall forward to the authorities of their country or army the marks or military papers of identification found upon

the bodies of the dead, together with a list of names of sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., that are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities in their own country.

Art. 5. Military authorities may make an appeal to the charitable zeal of the inhabitants to receive and, under its supervision to care for such sick and wounded of the armies, granting to persons responding to such appeals special protection and certain immunities.

CHAPTER II

Sanitary formations and establishments

Art. 6. Mobile sanitary formations (*i.e.*, those which are intended to accompany armies in the field) and fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.

Art. 7. The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy.

Art. 8. A sanitary formation or establishment shall not be deprived of the protection accorded by article 6 by the fact:

1. That the personnel of a formation or establishment is armed and uses its arms in self-defense or in defense of its sick and wounded.

2. That in the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels acting under competent orders.

3. That arms or cartridges, taken from the wounded and not yet turned over to the proper authorities, are found in the formation or establishment.

CHAPTER III

Personnel

Art. 9. The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered prisoners of war.

These provisions apply to the guards of sanitary formations and establishments in the case provided for in section 2 of article 8.

Art. 10. The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.

Each state shall make known to the other, either in time of peace, or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

Art. 11. A recognized society of a neutral state can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.

Art. 12. Persons described in articles 9, 10, and 11 will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power.

When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms and horses as their private property.

Art. 13. While they remain in his power, the enemy will secure to the personnel mentioned in article 9 the same pay and allowances to which persons in the same grade in his own army are entitled.

CHAPTER IV

Matériel

Art. 14. If mobile sanitary formations fall into the power of the enemy, they shall retain their matériel, including the teams, whatever may be the means of transportation and the conducting personnel. Competent military authority, however, shall have the right to employ it in caring for the sick and wounded. The restitution of the matériel shall take place in accordance with the conditions prescribed for the sanitary personnel, and, as far as possible, at the same time.

Art. 15. Buildings and materiel pertaining to fixed establishments shall remain subject to the laws of war, but cannot be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them, in case of important military necessity, if, before such use, the sick and wounded who are in them have been provided for.

Art. 16. The matériel of aid societies admitted to the benefits of this convention, in conformity to the condi-

tions therein established, is regarded as private property and, as such, will be respected under all circumstances, save that it is subject to the recognized right of requisition by belligerents in conformity to the laws and usages of war.

CHAPTER V

Convoys of evacuation

Art. 17. Convoys of evacuation shall be treated as mobile sanitary formation subject to the following special provisions:

1. A belligerent intercepting a convoy may, if required by military necessity, break up such convoy, charging himself with the care of the sick and wounded whom it contains.

2. In this case the obligation to return the sanitary personnel, as provided for in article 12, shall be extended to include the entire military personnel employed, under competent orders, in the transportation and protection of the convoy.

The obligation to return the sanitary matériel, as provided for in article 14, shall apply to railway trains and vessels intended for interior navigation which have been especially equipped for evacuation purposes, as well as to the ordinary vehicles, trains, and vessels which belong to the sanitary service.

Military vehicles, with their teams, other than those belonging to the sanitary service, may be captured.

The civil personnel and the various means of transportation obtained by requisition, including railway materiel and vessels utilized for convoys, are subject to the general rules of international law.

CHAPTER VI

Distinctive emblem

Art. 18. Out of respect to Switzerland the heraldic emblem of the red cross on a white ground, formed by the reversal of the federal colors, is continued as the emblem and distinctive sign of the sanitary service of armies.

Art. 19. This emblem appears on flags and brassards as well as upon all matériel appertaining to the sanitary service, with the permission of the competent military authority.

Art. 20. The personnel protected in virtue of the first paragraph of article 9, and articles 10 and 11, will wear attached to the left arm a brassard bearing a red cross on a white ground, which will be issued and stamped by competent military authority, and accompanied by a certificate of identity in the case of persons attached to the sanitary service of armies who do not have military uniform.

Art. 21. The distinctive flag of the convention can only be displayed over the sanitary formations and establishments which the convention provides shall be respected, and with the consent of the military authorities. It shall be accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.

Sanitary formations which have fallen into the power of the enemy, however, shall fly no other flag than that of the Red Cross so long as they continue in that situation.

Art. 22. The sanitary formations of neutral countries which, under the conditions set forth in article 11, have been authorized to render their services, shall fly, with the flag of the convention, the national flag of the belligerent to which they are attached. The provisions of the

second paragraph of the preceding article are applicable to them.

Art. 23. The emblem of the red cross on a white ground and the words *Red Cross* or *Geneva Cross* may only be used, whether in time of peace or war, to protect or designate sanitary formations and establishments, the personnel and materiel protected by the convention.

The principles of the Geneva Convention were adapted to naval war in a convention signed at The Hague on October 18, 1907, which was ratified by the United States senate on March 10, 1908. This convention contains twenty-eight articles, of which the first twenty-two here follow. The six articles omitted contain provisions relating to the ratification and denunciation of the convention by the signatory powers, which it seems unnecessary to include.

Art. 1. Military hospital ships, that is to say, ships constructed or assigned by states specially and solely with a view to assisting the wounded, sick or shipwrecked, the names of which have been communicated to the belligerent powers at the beginning or during the course of hostilities, and in any case before they are employed, shall be respected and cannot be captured while hostilities last.

These ships, moreover, are not on the same footing as warships as regards their stay in a neutral port.

Art. 2. Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent power to whom they belong has given them an official commission and has notified their names to the hostile power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from

the competent authorities declaring that the vessels have been under their control while fitting out and on final departure.

Art. 3. Hospital ships, equipped wholly or in part at the expense of private individuals or of officially recognized societies of neutral countries, shall be respected and exempt from capture, on condition that they are placed under control of one of the belligerents with the previous consent of their own government and with the authorization of the belligerent himself, and that the latter has notified their name to his adversary at the commencement of or during hostilities, and in any case before they are employed.

Art. 4. The ships mentioned in article 1, 2, and 3 shall afford relief and assistance to the wounded, sick and shipwrecked of the belligerents without distinction of nationality.

The governments undertake not to use these ships for any military purpose.

These vessels must in no wise hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and search them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.

As far as possible the belligerents shall enter in the log of the hospital ships the orders which they have given them.

Art. 5. Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth. The ships mentioned in articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half in breadth. The boats of

the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and further, if they belong to a neutral state by flying at the mainmast the national flag of the belligerent under whose control they are placed.

Hospital ships which, in the terms of article 4, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong. The ships and boats above mentioned which wish to insure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.

Art. 6. The distinguishing signs referred to in article 5 can only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned.

Art. 7. In the case of a fight on board a war ship, the sick wards shall be respected and spared as far as possible.

The sick wards and the matériel belonging to remain subject to the laws of war; they cannot, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for.

Art. 8. Hospital ships and sick wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.

The fact of the staff of the said ships and sick wards being armed for maintaining order and for defending

the sick and wounded, and the presence of wireless telegraphy apparatus on board, is not a sufficient reason for withdrawing protection.

Art. 9. Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed.

Art. 10. The religious, medical and hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterward leave, when the commander-in-chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances in pay which are given to the staff of corresponding rank in their own navy.

Art. 11. Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.

Art. 12. Any warship belonging to a belligerent may demand that sick, wounded or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, or boats whatever the nationality of these vessels, should be handed over.

Art. 13. If sick, wounded or shipwrecked persons are

taken on board a neutral warship, every possible precaution must be taken that they do not again take part in the operations of the war.

Art. 14. The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to any enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts.

Art. 15. The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral state and the belligerent states, be guarded by the neutral state so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the state to which the shipwrecked, sick or wounded persons belong.

Art. 16. After every engagement the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.

Art. 17. Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospital and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which

are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.

Art. 18. The provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention.

Art. 19. The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with instructions of their respective governments and in conformity with the general principles of the present convention.

Art. 20. The signatory powers shall take the necessary measures for bringing the provisions of the present convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public.

Art. 21. The signatory powers likewise undertake to enact or to propose to their legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorized use of the distinctive marks mentioned in article 5 by vessels not protected by the present convention.

They will communicate to each other, through the Netherland Government, the enactments for preventing such acts at the latest within five years of the ratification of the present convention.

Art. 22. In the case of operations of war between the land and sea forces of belligerents, the provisions of the present convention do not apply except between the forces actually on board ship.

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